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In the Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

In *Pennsylvania* v. *Delaware Valley Citizens' Council*, 107 S. Ct. 3078 (1987), this Court held that an attorneys' fee multiplier reflecting the risk of loss in litigation is unavailable under federal fee-shifting statutes. Nevertheless, the court of appeals authorized a risk multiplier in this class action brought under the Magnuson-Moss Act, holding that *Delaware Valley* and the express limitation on attorneys' fees contained in the Act were irrelevant because the parties reached a settlement that resulted in the creation of a monetary fund to compensate the plaintiff class. The question presented is as follows:

Whether, in class actions filed under federal statutes that provide for an award of attorneys' fees, a "risk multiplier" is available, notwithstanding this Court's decision in *Delaware Valley* and Congress's express limitation on the amount of attorneys' fees, whenever there is a settlement that produces a monetary fund for the plaintiff class.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Respondent Arlie Glen Skelton is the named representative of a plaintiff class consisting of:

> All original owners (other than solely for purposes of resale) of a General Motors 1976-1980 model year vehicle equipped with a THM 200 transmission purchased in the United States, its possessions and territories, or the District of Columbia, who incurred any transmission repair expense within the first 50,000 miles of use of that vehicle.

Respondent law firms seeking attorneys' fees are: Sachnoff, Weaver & Rubenstein; Charles A. Boyle & Associates; Corinblit & Seltzer; Abraham N. Goldman & Associates, Ltd.; Goodkind, Weschler, Labaton & Rudoff; Frances E. Goodman, P.C.; William J. Harte, Ltd.; Law Offices of Beverly C. Moore, Ltd.; and Zwerling, Schacter & Zwerling.

Petitioner General Motors Corporation's subsidiaries (excluding wholly-owned subsidiaries) and affiliates are listed in App., *infra*, 77a-79a.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

General Motors Corporation ("GM") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 860 F.2d 250. The initial opinion of the district court (App., *infra*, 21a-68a) is reported at 661 F. Supp. 1368. The opinion of the district court on remand from the court of appeals (App., *infra*, 69a-72a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1988 (App., *infra*, 1a). A timely petition for rehearing with suggestion for rehearing en banc was denied on January 13, 1989 (*id.* at 73a). On March 27, 1989, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including May 13, 1989 (*id.* at 76a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Magnuson-Moss Act") authorizes awards of attorneys' fees subject to the following limitations (15 U.S.C. § 2310(d)(2)):

> If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

STATEMENT

The question in this case is whether respondent law firms may be awarded an attorneys' fee multiplier—over and above the reasonable lodestar fee based on time actually expended and reasonable hourly rates—because their receipt of fees was contingent upon prevailing in this action. In *Pennsylvania* v. *Delaware Valley Citizens' Council*, 107 S. Ct. 3078 (1987) ("*Delaware Valley II*"), this Court held that litigation risks do not justify a multiplier to the lodestar fee. Nevertheless, the court of appeals held that a risk multiplier can be awarded here on the theory that the fees would be paid from a monetary fund established by a settlement.

The court of appeals' ruling is flatly inconsistent with the rationale of *Delaware Valley II* and distorts the litigation system in ways that are totally at odds with congressional intent. The decision below leads to the untenable result of providing the largest awards of attorneys' fees in the least meritorious cases, thereby encouraging the filing of marginal suits that consume scarce

litigation resources and diverting lawyers from more substantial claims whose prosecution would better promote federal statutory policies. Equally disturbing, by making the availability of fee multipliers turn on the existence of a monetary settlement, the decision below gives class counsel a direct financial stake in settling a case regardless of the best interests of the class, thus engendering an intolerable conflict of interest between the class members and their attorneys.

The court of appeals' decision is both bad law and bad policy. In *Delaware Valley II*, this Court sought to put an end to attorneys' fee multiplier claims in cases brought under federal fee-shifting statutes. Contrary to the court of appeals' reasoning, the commonplace occurrence of a monetary settlement does not alter the governing principles that preclude multipliers in such cases or justify the attempt of respondent law firms to appropriate more than $1 million that otherwise would go to their class-member clients. As a practical matter, the decision below, unless reversed, will make *Delaware Valley II* a dead letter in the vast number of class action cases in which a settlement is negotiated.

A. Background

1. General attorneys' fee principles

In the American legal system, the party that prevails in litigation traditionally must pay its own attorneys' fees. See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). The courts have recognized an exception to this American Rule in so-called "common fund" cases in which attorneys' fees are payable from a monetary award that the lawsuit achieves for the benefit of claimants in addition to the named plaintiff. See, *e.g.*, *Trustees* v. *Greenough*, 105 U.S. 527 (1882). This doctrine rests on the principle that it would be inequitable to allow the beneficiary class to enjoy the fruits of a lawsuit without contributing to the costs of the litigation.

In recent years Congress also has enacted statutory exceptions to the American Rule. Approximately 150 federal statutes, including the Magnuson-Moss Act, now allow a prevailing plaintiff to receive attorneys' fees from the losing defendant, and another 50 such statutes authorize fees to be awarded to the prevailing plaintiff's counsel from the plaintiff's recovery. See 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* 5-3 to 5-7 (1989).

2. This litigation and the settlement agreement

This litigation was brought under the Magnuson-Moss Act, 15 U.S.C. §§ 2301 *et seq.* The consolidated class action complaints challenged the performance of transmissions in certain lines of GM automobiles (App., *infra*, 21a).

Following extensive preliminary proceedings, the parties entered into a comprehensive settlement agreement. Pursuant to the agreement, GM established a $17 million fund to reimburse the consumer class members for service and repair costs incurred as a result of transmission failure. After giving notice to the class and conducting a fairness hearing, the district court approved the settlement.

The settlement agreement also addressed the issue of attorneys' fees. The Magnuson-Moss Act allows a consumer who "finally prevails" in litigation under the Act to be awarded "as part of the judgment a sum equal to the aggregate amount of cost and expenses (*including attorneys' fees based on actual time expended*) determined by the court to have been reasonably incurred by the plaintiff." 15 U.S.C. § 2310(d)(2) (emphasis added); see page 2, *supra*. In the present case, the settlement agreement provided that attorneys' fees would be paid solely from the settlement fund and would be determined by the court "based on compensation for actual hours spent (the 'lodestar figure')" rather than on a

percentage of the settlement. Settlement Agreement, ¶ 34. The settlement agreement also contained a "reverter" clause that provided that any portion of the settlement fund remaining after the recovery of attorneys' fees and the distribution to plaintiff class members would revert to GM. Settlement Agreement, ¶ 25.

In addition to seeking the lodestar amount, respondent law firms stated their intention to request a "multiplier" payable out of the class settlement fund. GM stated that it would oppose such a claim, and the settlement agreement specifically reserved the parties' right to appeal the court's ruling on the multiplier issue. Settlement Agreement, ¶ 34.

B. Respondents' Claim For Attorneys' Fees And The District Court's Ruling

In response to the request of respondent law firms for a lodestar determination based on time expended and hourly rates, the district court awarded a total lodestar of approximately $2 million in attorneys' fees (plus $680,000 in expenses). This lodestar reflected an allowed total of 12,700 billable hours and an approved hourly rate as high as $240. App., *infra*, 66a-67a, 70a.

Respondent law firms also sought an attorneys' fee "multiplier" of 1.75 times this substantial lodestar amount. The asserted justification for this multiplier was "the contingent nature of the lawsuit and the significant risks undertaken by [the attorneys] in this case" (App., *infra*, 57a). Such a multiplier would have inflated the district court's granted lodestar to $3.5 million. Put differently, this multiplier would have had the practical effect of raising respondent law firms' top rate to $420 per hour or, alternatively, of increasing the total compensable hours to some 22,000—over 9,500 of which were not actually expended but for which respondent law firms nonetheless would be paid.

The district court rejected the request for a multiplier (App., *infra*, 57a-65a). The court first concluded that "the standards for determining reasonable attorneys' fees in common fund cases and statutory fee cases should not be significantly different" (*id.* at 29a). It explained that "the use of statutory fee guidelines to determine a proper fee award is especially relevant" in cases like the present one that are "commenced and prosecuted under a federal statute which specifically provides for an award of attorneys' fees. When parties settle a case involving statutory fees, the amount ultimately awarded should not be dependent upon whether the fees are assessed directly against the defendant, or against a fund created by the defendant" (*ibid.*); see also *id.* at 57a-58a.

The district court thus determined that the congressional policy underlying the attorneys' fee limitation in the Magnuson-Moss Act was fully applicable to the respondent law firms' request for a multiplier (App., *infra*, 57a-58a):

> [E]ven if the fee award is based on the common fund doctrine, any limitation contained in the Magnuson-Moss Warranty Act is a relevant consideration in determining whether to award a "risk" multiplier in this case. The structure of the settlement agreement should not divert the court from the Congressional intent underlying the passage of this Act.

Finding that "Section 2310(d)(2) evinces a Congressional intent to limit the fee award to the time actually expended in pursuit of a plaintiff's claim," the court held that "a plaintiff in a Magnuson-Moss case is not entitled to an upward multiplier adjustment of the fees awarded" (*id.* at 58a).

In addition, the district court ruled that no multiplier was justified under general attorneys' fee principles.[1]

[1] The court's ruling was issued prior to, but anticipated, this Court's decision in *Delaware Valley II*.

The court noted that the lodestar computed from reasonable time and rate figures " 'is *presumed* to be the reasonable fee' " (App., *infra*, 60a-61a (emphasis in original), quoting *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984)). Moreover, " '[t]he novelty and complexity of the issues' " —which constitute the principal reasons for the riskiness of the litigation (see *Delaware Valley II*, 107 S. Ct. at 3087)—" 'presumably were fully reflected in the number of billable hours recorded by counsel' " and therefore are not " 'appropriate factor[s] in determining whether to increase the basic fee award' " (App., *infra*, 61a, quoting *Blum*, 465 U.S. at 898). As the court explained (App., *infra*, 44a-45a, 64a), its lodestar calculation had taken

> into account all relevant factors, including * * * the skill and the difficulty of the legal work completed, * * * [the] results obtained, * * * and the contingency of the fee.
>
> * * * * *
>
> The attorneys' fees that this court has included in its calculation of the lodestar amounts * * * adequately compensate[] these firms for the "risk" involved in prosecuting this case.

In rejecting the requested multiplier, the district court heeded this Court's admonition that attorneys' fees are not " 'a form of economic relief to improve the financial lot of attorneys' " but instead serve " 'to enable private parties to obtain legal help in seeking redress for injuries' " (App., *infra*, 62a, quoting *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*")). While "mindful of the chilling effect on future consumer class actions that might result from failure to adequately compensate counsel for their efforts in this litigation" (App., *infra*, 45a), the court found that the lodestar constituted a fully adequate attorneys' fee and that "an upward multiplier of the basic lodestar fees is neither necessary nor appropriate" (*id.* at 64a).

C. The Court Of Appeals' Ruling And The District Court's Decision On Remand

In an opinion by Judge Cudahy, the Seventh Circuit reversed the district court's multiplier ruling (App., *infra*, 1a-20a). The court of appeals did not dispute the substantial objections voiced in the opinions of this Court (including the recent *Delaware Valley II* decision) to awards of multipliers under fee-shifting statutes. In cases governed by fee-shifting statutes, the court acknowledged, there are "stringent requirements for awarding [multipliers]" (*id.* at 7a).

The court of appeals concluded, however, that this case, although brought under the Magnuson-Moss Act, was governed by equitable common fund principles rather than the Act's express fee-shifting provision because the attorneys' fees would be paid from a settlement fund. In the court's view, "when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorneys' fees, equitable fund principles must govern the court's award of the attorneys' fees" (App., *infra*, 12a). For this reason, "the fee-shifting provision of the Magnuson-Moss Act should [not] affect the fee determination in this case, which was settled, resulting in a common fund" (*id.* at 9a).

Having concluded that the present case is governed by equitable common fund principles rather than the Magnuson-Moss Act's fee provision, the court of appeals next determined that "equitable fund principles allow for an upward adjustment of the lodestar" (App., *infra*, 10a). Such a multiplier was justified, the court stated, because "at least in the common fund context, attorneys whose compensation depends on their winning the case, must make up in compensation in the cases they win for the lack of compensation in the cases they lose" (*id.* at 8a). Under this approach, the court indicated that a multiplier of two—that is, a 100% increase over the lodestar—would generally be appropriate (*id.* at 16a).

Although it held that the concerns raised by risk multipliers under fee-shifting statutes are not applicable in the common fund context, the court of appeals was forced to concede that those same concerns rendered it "difficult[]" to determine the magnitude of any multiplier (App., *infra*, 15a). "This task," the court stated, "is not without its problems" (*id.* at 16a). Nevertheless, and without providing any standard to guide the inquiry, the court of appeals remanded the case to the district court to "assess the riskiness of [this] litigation" in order "to account for the contingent-nature of the compensation" (*ibid.*).

Pursuant to the court of appeals' mandate, the district court, after conducting further proceedings on the issue of the risk multiplier, reversed its prior decision and approved a multiplier of 1.6 (App., *infra*, 69a-72a). This resulted in an effective increase in the maximum hourly billing rate from $240 to approximately $385 or, stated otherwise, an enhancement of the total compensable hours from 12,700 to more than 20,300. As a consequence, respondent law firms were awarded a bonus of $1.2 million for commencing and settling a "risky" lawsuit—a bonus that will be extracted from the pockets of the consumer class members.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS HAS RESOLVED A RECURRING AND IMPORTANT ATTORNEYS' FEE QUESTION IN A MANNER THAT CONFLICTS WITH PAST DECISIONS OF THIS COURT AND WITH STATUTORY STANDARDS PRESCRIBED BY CONGRESS

A. The enormous practical importance of attorneys' fee issues for the legal system can hardly be questioned. Congress has enacted some 200 attorneys' fee statutes (see page 4, *supra*), and attorneys' fee litigation has become a virtual cottage industry for lawyers. In recog-

nition of the great public significance of these issues, this Court has repeatedly granted review in attorneys' fee cases in recent years.[2] The decision below—which effectively renders class action settlements creating monetary funds "a form of economic relief to improve the financial lot of attorneys" (*Delaware Valley I*, 478 U.S. at 565)—pointedly demonstrates the critical need for this Court's continued supervision.

To date, this Court has struggled to restrain the centrifugal forces that produce large awards of attorneys' fees and to conform fee awards to the needs of the litigation system. In particular, the Court's decisions have recognized that risk multipliers present "a wide variety of problems" and create "'perverse penalt[ies]'" and undesirable incentives for "'marginal litigation'" (*Delaware Valley II*, 107 S. Ct. at 3083). In addition, because risk multipliers entail substantial "difficulties in administration" (*id.* at 3087) and require "protracted, complicated and exhausting" proceedings (*id.* at 3085), their use is contrary to the Court's admonition that fee disputes "should be simplified to the maximum extent possible" (*ibid.*) and "should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

It is now well settled that the lodestar, "the 'product of reasonable hours times a reasonable rate[,]' normally provides a 'reasonable' attorneys' fee." *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984), quoting *Hensley*, 461 U.S. at 434; see also, *e.g.*, *Blanchard* v. *Bergeron*, 109 S. Ct. 939 (1989). There is a "strong presumption" that the lodestar figure provides adequate compensation (*Delaware*

[2] See, *e.g.*, the following decisions and the cases cited therein: *Texas State Teachers Ass'n* v. *Garland Indep. School Dist.*, 109 S. Ct. 1486 (1989); *Blanchard* v. *Bergeron*, 109 S. Ct. 939 (1989); *Delaware Valley II*, *supra*; *Delaware Valley I*, *supra*; *Riverside* v. *Rivera*, 477 U.S. 561 (1986); *Blum* v. *Stenson*, 465 U.S. 886 (1984); *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983).

Valley I, 478 U.S. at 565). In all but the rarest and most exceptional case (see *ibid.*), "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee" and "leaves very little room for enhancing the award" (*id.* at 566).

In *Delaware Valley II*, this Court specifically held that a multiplier to the reasonable lodestar fee is unavailable to reflect the "risk" that the plaintiff might not have prevailed in the litigation. The only suggested exception to this governing principle is if "the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market'" (107 S. Ct. at 3091 (O'Connor, J., concurring in part and concurring in the judgment))—an exception that the court below did not even purport to rely upon. Significantly, *none* of the Justices in *Delaware Valley II* would have upheld a multiplier of the sort allowed by the Seventh Circuit here based on the perceived riskiness *of the particular lawsuit*. See *id.* at 3089 (plurality opinion of White, J.); *id.* at 3091 (O'Connor, J., concurring); *id.* at 3097-3098 (Blackmun, J., dissenting).

The decision below is a patent evasion of *Delaware Valley II*. While this Court has recognized that fee awards are not designed to provide "economic relief" for attorneys or to "replicate exactly the fee an attorney could earn through a private fee arrangement with his client" (*Delaware Valley I*, 478 U.S. at 565),[3] the court of appeals reasoned that multipliers are justified to enable lawyers to "make up in compensation in the cases

[3] See also, *e.g.*, *Blanchard* v. *Bergeron*, 109 S. Ct. at 945 ("we have not accepted the contention that fee awards in § 1983 damages cases should be modeled upon the contingent fee arrangements used in personal injury litigation"); *Riverside* v. *Rivera*, 477 U.S. at 578 n.9 (plurality opinion of Brennan, J.) ("Congress clearly rejected the notion that attorney's fees under § 1988 should be based on private-sector fee arrangements").

they win for the lack of compensation in the cases they lose" and to reproduce "exactly what the attorneys would have earned from clients who agreed to pay for services regardless of success" (App., *infra*, 8a, 16a). While the plurality and concurring opinions in *Delaware Valley II* concluded that the lodestar "is flexible enough to account for great variation in the nature of the work performed in, and the challenges presented by, different cases" (*Delaware Valley II*, 107 S. Ct. at 3091 (O'Connor, J., concurring)), and that multipliers are "superfluous" and lead to "windfall[s]" for lawyers (*id.* at 3087 (plurality opinion)), the court of appeals declared that multipliers over and above the lodestar are routinely necessary to yield reasonable attorneys' fees. And while this Court has emphasized that multipliers are "a particularly uncertain matter" to assess (*id.* at 3085) and result in "inequities" and administrative "difficulties" (*id.* at 3087 (plurality opinion)), the court of appeals swept aside all of these practical objections.

The Seventh Circuit's decision thus turns established attorneys' fees principles on their head. In effect, the court of appeals, precisely contrary to *Delaware Valley II*, created a strong presumption—if not an outright rule—in favor of multipliers to compensate counsel for the riskiness of class actions that result in a monetary settlement. Since complex litigation (particularly class action litigation) always involves some significant risk of loss, the court of appeals' theory routinely would require risk multipliers. See *Delaware Valley II*, 107 S. Ct. at 3086 (plurality opinion) ("[b]ecause it is difficult ever to be completely sure that a case will be won, enhancing fees for the assumption of the risk of nonpayment would justify some degree of enhancement in almost every case").

This concern is not speculative or hypothetical. The district court in this very case, applying the court of appeals' decision on remand, felt obliged to reverse its orig-

inal determination and to approve a substantial 1.6 multiplier. This decision increased the fee award payable out of the settlement fund from $2 million to $3.2 million, which correspondingly diminished the funds available to consumer class members.[4]

B. The court of appeals sought to avoid *Delaware Valley II* by seizing on the fact that the attorneys' fees in this case, unlike in *Delaware Valley II*, would be payable from a settlement fund financed solely by the defendant, rather than directly from the defendant's purse under a fee-shifting statute. In the court's view, the settlement transformed a fee-shifting case into a common fund case, and as a result both *Delaware Valley II* and the policies of Congress governing attorneys' fee awards became completely irrelevant.

The critical question—and the question never answered by the court of appeals—is why? Why should *Delaware Valley II* be rendered entirely inapplicable in this context? Why should the limitations carefully fashioned by Congress in the attorneys' fee provision of the Magnuson-Moss Act (and in numerous other statutes)—under which a multiplier would clearly have been barred if this case had proceeded to trial (see page 22, *infra*)—suddenly drop out of this case simply because the parties reached a pretrial settlement that produced a monetary fund? Why should the adverse consequences of multipliers for the judicial system, which both this Court and Congress have recognized, be suffered whenever a monetary settlement is negotiated?

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[4] The court of appeals' decision, while by no means limited to the Magnuson-Moss Act, is especially wrong in cases arising under that statute, which makes explicit Congress's intention that reasonable attorneys' fees be "based on actual time expended" (15 U.S.C. § 2310(d)(2)). This express and unambiguous statutory language conclusively demonstrates that multipliers are inconsistent with congressional policy. See page 22, *infra*.

As we discuss in the next section of this petition, the court of appeals' ruling cannot be reconciled with the decisions of this Court and the attorneys' fee statutes enacted by Congress. That erroneous ruling, if allowed to stand, will encourage the filing of marginal cases as a kind of lottery for plaintiffs' counsel seeking a bonanza of fees if they manage to negotiate a settlement. What is more, by giving plaintiffs' counsel a powerful incentive to settle cases regardless of the best interests of the class, the court of appeals' decision will create a severe conflict between class counsel and their clients. Finally, the decision below will inevitably generate an ongoing spate of complex and time-consuming fee disputes—disputes that are entirely collateral to the underlying controversy between the parties, and for which the court of appeals provided no meaningful standards or guidance. Such harmful consequences were not tolerated in *Delaware Valley II*, and they should not be tolerated here.

Indeed, the practical significance of the present case is even greater than that of *Delaware Valley II*. The overwhelming majority of cases in civil litigation are resolved by settlement.[5] If a class action settlement resulting in the creation of a damages fund is all that is necessary to escape the "stringent requirements" (App., *infra*, 7a) of *Delaware Valley II*, the applicability of that decision will be severely limited, and this Court's effort to restrain runaway attorneys' fee multipliers will be largely nullified.

C. Other circuits, contrary to the decision below, have given full effect to *Delaware Valley II* by rejecting risk multipliers in class action settlements resulting in the

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[5] See Federal Judicial Center, *Settlement Strategies for Federal District Judges* 7 (1986) (noting that the "vast majority" of civil cases in federal court terminate by settlement and that the proportion of cases resolved by settlement has steadily increased in recent years). Accord Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U.L. Rev. 542, 545 (1980).

creation of monetary funds. For example, in *Norman* v. *Housing Authority of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988), the Eleventh Circuit held that class counsel was *not* entitled to a multiplier after the case had been settled for $1 million in damages; noting that *Delaware Valley II* allowed an enhanced award "only where it is shown that such enhancement is necessary to assure the availability of counsel" (*id.* at 1302), the court denied a multiplier because "the record is absolutely devoid of any evidence that would suggest that enhancement over the [lodestar] rates requested is necessary to attract competent counsel into the field" (*id.* at 1306). Likewise, in *Student Pub. Int. Res. Group* v. *AT & T Bell Lab.*, 842 F.2d 1436, 1451-1452 (3d Cir. 1988), the Third Circuit held that a requested "contingency multiplier would present vast administrative problems" and denied any post-settlement fee enhancement under *Delaware Valley II*. Accord *Schwartz* v. *Novo Industri A/S*, 119 F.R.D. 359 (S.D.N.Y. 1988).

In order for fee-shifting statutes to serve their legitimate purposes without imposing undue costs on the judicial system, there is a compelling need to dispel this disagreement concerning *Delaware Valley II*, particularly in cases that terminate by settlement—by far the most common disposition of class action suits in federal court. Federal district courts, which face extraordinary burdens in administering class actions and in reviewing and approving settlements, are in need of further guidance from this Court.[6]

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[6] See, *e.g.*, *In re PSFS Sec. Litig.*, No. 85-4978, n.8 (E.D. Pa. Nov. 30, 1987) (available on LEXIS, Genfed library, Courts file) ("[i]t is not clear whether [the *Delaware Valley II* limitations] also apply to this [multiplier] factor in common fund cases"); *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 738 (D. Utah 1987) (stating that *Delaware Valley II* "may raise more questions than it answers"); *Garmong* v. *Montgomery County*, 668 F. Supp. 1000, 1008 (S.D. Tex. 1987) (expressing confusion over the scope of *Delaware Valley II*).

The Seventh Circuit's holding that *Delaware Valley II* has no application to monetary settlements will be relied on not only in cases brought under the Magnuson-Moss Act, but also in class action suits brought under a host of other federal fee-shifting statutes, most of which result in settlement and the creation of a "common fund" for the plaintiff class. In these circumstances, this Court's intervention is necessary to prevent wide-spread circumvention of *Delaware Valley II* and to protect the federal judicial system from the burdens and dislocations caused by claims for "multipliers" of attorneys' fees.

II. THE COURT OF APPEALS' HOLDING THAT RISK MULTIPLIERS ARE AVAILABLE WHEN CLASS ACTION SETTLEMENTS RESULT IN THE CREATION OF A MONETARY FUND IS PLAINLY IN ERROR AND SHOULD BE REVERSED

The Seventh Circuit did not and could not deny that *Delaware Valley II*, if applicable to this case, would preclude the risk multiplier that the court authorized. Under *Delaware Valley II*, "any enhancement [of the presumptively reasonable lodestar fee] based on 'legal' risks or risks peculiar to the case" is impermissible (107 S. Ct. at 3091 (O'Connor, J., concurring)); see page 11, *supra*. As the plurality noted, such risk enhancement "result[s] not in a 'reasonable' attorney's fee, but in a windfall for an attorney who prevailed in a difficult case" (*id.* at 3087).

The court of appeals reasoned, however, that negotiation of a monetary settlement for the plaintiff class takes the case out of the attorneys' fee provision of the Magnuson-Moss Act under which it was being litigated and therefore out of the principles of *Delaware Valley II*. In that situation, according to the court below, this Court's rationale in *Delaware Valley* II and the policies of Congress are completely beside the point, and the case is controlled by an entirely different legal standard based on the equitable "common fund" doctrine.

But the decisions of this Court and the enactments of Congress cannot be so easily swept aside. As we now show, there is no reasoned basis for the court of appeals' broad exemption of class action settlements from the prohibition that would otherwise apply under federal fee-shifting statutes to risk multipliers. The law cannot sensibly distinguish between settled and litigated cases for purposes of awarding risk bonuses or lavishly reward plaintiffs' counsel for bringing and settling "risky" cases.

A. *Delaware Valley II* rested on this Court's recognition that risk multipliers under fee-shifting statutes lead to harmful results that cannot be squared with the requirements of sound judicial administration or the intention of Congress. Contrary to the court of appeals' belief, risk multipliers in class action settlements are subject to precisely the same objections.

To begin with, this Court in *Delaware Valley II* emphasized that a risk multiplier substantially duplicates elements of compensation that already are included in the lodestar:

> The reasons a particular lawsuit [is] considered to be "risky" for an attorney are because of the novelty and difficulty of the issues presented, and because of the potential for protracted litigation. Moreover, when an attorney ultimately prevails in such a lawsuit, this success will be primarily attributable to his legal skills and experience, and to the hours of hard work he devoted to the case. These factors, however, are considered by the court in determining the reasonable number of hours expended and the reasonable hourly rate for the lodestar, and *any further increase in this sum based on the risk of not prevailing would result not in a "reasonable" attorney's fee, but in a windfall for an attorney who prevailed in a difficult case.*

107 S. Ct. at 3087 (plurality opinion) (emphasis added); see also *id.* at 3089 (O'Connor, J., concurring). Whether

a case is tried or settled, the elements of the lodestar calculation—reasonable hours and reasonable hourly rates —are the same. If, as *Delaware Valley II* held, the use of a risk multiplier confers an unconscionable windfall on attorneys in a case that goes to trial, settlement obviously cannot transform that windfall into a "reasonable" attorneys' fee.

Similarly, the use of risk multipliers to calculate fee awards produces the "highest fees in cases least likely to be won" (*Delaware Valley II*, 107 S. Ct. at 3086 (plurality opinion)). That perverse result encourages marginal litigation and tends to "attract competent counsel away from prosecuting clear violations of rights in favor of cases with a higher potential award." Rader, *The Fee Awards Act of 1976: Examining the Foundation for Legislative Reform of Attorney's Fees Shifting*, 18 J. Marshall L. Rev. 77, 105 (1984). In this way, risk multipliers—wherever used—run directly counter to Congress's primary purpose of encouraging suits that vindicate the core policies of federal law.

In addition, risk enhancement, which "compensate[s] plaintiff's lawyers for not prevailing against defendants in other cases[,] * * * is not consistent with Congress' decision to adopt the rule that only prevailing parties are entitled to fees" (*Delaware Valley II*, 107 S. Ct. at 3086 (plurality opinion)). This Court's reasoning cannot be squared with the court of appeals' announced objective of enabling plaintiffs' attorneys to "make up in compensation in the cases they win for the lack of compensation in the cases they lose" (App., *infra*, 8a). If it is unfair to require defendants in fee-shifting cases to subsidize plaintiffs' attorneys for unsuccessful litigation elsewhere, it is equally unfair to impose that burden on the plaintiff class in monetary settlements.

Finally, the court of appeals' ruling leads to irrational distinctions in the cases in which attorneys' fee multipliers can be awarded. For instance, *Delaware Val-*

ley II consistently has been applied to class action settlements involving equitable relief. See, *e.g.*, *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d 43, 53 (D.C. Cir. 1987) ("[s]ince the district court in this case based its award of a non-payment multiplier on * * * the court's assessment of the difficulty and risk unique to this case, *Delaware Valley II* compels us to reverse the district court's [post-settlement] award of a 10% risk multiplier"), vacated in part on other grounds, 857 F.2d 1516 (1988) (en banc); accord *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987). However, under the Seventh Circuit's rationale, if an identical class action results in a settlement creating a monetary fund, class counsel could claim a risk-enhanced fee. Congress clearly could not have intended such an arbitrary result. As this Court recently has observed, federal fee-shifting statutes "make[] no distinction between actions for damages and suits for equitable relief" (*Blanchard* v. *Bergeron*, 109 S. Ct. at 945).

B. The court of appeals' decision also creates an intolerable conflict of interest between counsel and the class. Under a fee-shifting statute, if a class action is tried on the merits and a favorable judgment is secured, the class would recover an award of damages unreduced by any attorneys' fees, and class counsel would receive payment from the losing defendant at the ordinary lodestar rate. Under the Seventh Circuit's common fund rationale, by contrast, a pretrial settlement would justify a large multiplier, and the entire award of fees would be borne by the plaintiff class. From the vantage point of class counsel, the fact that a multiplier is routinely available following settlement—but is *not* available if the case proceeds to trial—creates a powerful temptation to settle cases regardless of the best interests of the class. The multiplier places overwhelming economic pressure on class counsel to settle even though a larger judgment could be obtained at trial, and even though attorneys'

fees in the settled case would come out of the plaintiffs' pockets rather than from the defendant.

The court of appeals offered no justification for pitting class counsel against the class in this fashion. Furthermore, it is simply illogical to construe *Delaware Valley II* to protect defendants who are adjudged to be violators of federal statutes from having to pay "risk multipliers," while exposing plaintiffs—who are the beneficiaries of these statutes and the intended recipients of any settlement fund—to significant reductions in their recoveries in order to pay an enhanced attorneys' fee.

Contrary to the court of appeals' assumption, "equitable principles" inherent in the "common fund" doctrine do nothing to justify this glaring conflict between class counsel and the class members. The "common fund" doctrine rests on the equitable principle that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee" and that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980). In contrast to such a "reasonable" fee, which is already reflected in the lodestar, a risk multiplier represents a "windfall." Thus, the court of appeals' decision is entirely unnecessary to prevent the unjust enrichment of absent class members: it serves only to confer a lavish bonus on class counsel that is duplicative of the lodestar award. That bonus constitutes unjust enrichment of counsel at the expense of their class-member clients.

The court of appeals also was plainly wrong in suggesting (see App., *infra*, 6a-7a) that its decision will have no impact on defendants. The court ignored the fact that improper attorneys' fee awards can deprive defendants of the benefit of settlement agreements.

Defendants have a strong interest in seeing that the proceeds of a settlement go to the plaintiffs rather than the plaintiffs' attorneys. Here, for example, GM sought to ensure that the class members would receive the maximum benefit of the settlement and that any excess amount would revert to GM rather than accrue to respondent law firms. Accordingly, GM expressly reserved its right to challenge any request for a risk multiplier on the ground that such a bonus was not authorized by law. See page 5, *supra*. The upshot of the court of appeals' multiplier ruling is that, while GM paid millions of dollars to reach an amicable resolution of this suit and promote its goodwill with past and prospective customers, an additional $1.2 million now has been diverted from the intended beneficiaries to class counsel.

C. In the final analysis, the court of appeals' decision rests heavily on a policy judgment that the private market model should govern attorney compensation in class actions. As the court below candidly acknowledged, its risk-enhancement requirement replicates the private market by compensating class counsel in "the way a plaintiff's attorney may be compensated by a contingent fee" (App., *infra*, 4a); by effectively compensating counsel for the cases they lose as well as the ones they win, the multiplier provides "exactly what the attorneys would have earned from clients who agreed to pay for services regardless of success" (*id.* at 16a). However, this Court consistently has rejected the proposition that the private market model should govern the determination of "reasonable attorneys' fees" under federal fee-shifting statutes (see page 11 & note 3, *supra*). Instead, fees should provide "reasonable compensation, in light of all of the circumstances, for the *time* and *effort* expended by the attorney for the prevailing plaintiff, *no more and no less*" (*Blanchard* v. *Bergeron*, 109 S. Ct. at 944 (emphasis added)). Since Congress has not permitted such multipliers, it plainly was inappropriate for the court of appeals to do so under judge-made "equity" principles.

Nowhere is the clash between the court of appeals' common fund theory and the congressional policy underlying federal fee-shifting provisions more pronounced than in class actions brought under the Magnuson-Moss Act. The Act allows a court to award a prevailing plaintiff reasonable attorneys' fees "based on actual time expended" (15 U.S.C. § 2310(d)(2) (emphasis added)). This language plainly evidences Congress's intent to limit fee awards to the reasonable lodestar—a determination that squarely forecloses a risk multiplier over and above the lodestar.[7]

The court of appeals attempted to skirt this unambiguous congressional objective by asserting that "[b]ecause a risk enhancer is applicable to the lodestar—it multiplies the lodestar by a number representing the probability of loss—it is based on the number of hours the attorneys worked and * * * [therefore] is 'based on actual time expended'" (App., *infra*, 14a). But the court's strained effort to reconcile its decision with the statutory language is unavailing. By no stretch of the English language can the phrase "based on actual time expended" be construed to authorize a *multiplier* of up to *twice* the actual time expended. The Magnuson-Moss fee-shifting provision, which was designed to protect consumers while restraining undeserved awards to counsel, plainly prohibits the use of risk multipliers in litigation commenced under the Act. Certainly nothing in the statute or its history justifies the court of appeals' theory that fees should be awarded to counsel in their successful cases in order to compensate them for their losses in other cases.

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[7] The legislative history reinforces the conclusion that Congress intended to preclude any enhancement of lodestar fees under "common fund" principles. See S. Rep. No. 151, 93d Cong., 1st Sess. 24 (1973) ("an attorney's fee is to be based upon actual time expended rather than being tied to any percentage of the recovery"). As this Court explained in *Blum* v. *Stenson*, 465 U.S. at 900 n.16, a "percentage of the fund" generally refers to a "common fund" fee award.

The court of appeals also suggested that, even if the Magnuson-Moss fee-shifting provision prohibits risk multipliers in litigated cases, it does not apply to settlements. The court stated that it was unable to find "any evidence in the legislative history of Congress' intent to apply the fee-shifting provision to common fund or settlement cases of any kind" (App., *infra*, 12a).

The court of appeals could not find this evidence because it looked to the wrong legislative materials.[8] In fact, the legislative history of the Magnuson-Moss Act makes clear that Congress intended the fee-shifting provision to apply to settlements. See S. Rep. No. 151, 93d Cong., 1st Sess. 22-23 (1973) ("[a] purchaser * * * may resort to formal adversary proceedings with reasonable attorney's fees available if successful in the litigation (*including settlement*)") (emphasis added). This understanding comports with the general rule that the applicability of fee-shifting provisions is *not* conditioned on "full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). See also *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F.2d at 297; *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d at 46. Thus, the court of appeals plainly erred in importing into the statute a novel "adjudication-on-the-merits" requirement in an attempt to justify an otherwise impermissible fee multiplier.

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[8] The court below considered the legislative history of a predecessor (S. 986, 92d Cong., 1st Sess. (1971)) to the bill that eventually was passed into law (S. 356, 93d Cong., 1st Sess. (1973)). See S. Rep. No. 151, 93d Cong., 1st Sess. 5-6 (1973). In so doing, it ignored the subsequent history of the enacted bill that specifically recognized the applicability of the attorneys' fee provision to cases that are settled.

III. REVIEW IS WARRANTED AT THIS TIME

The foregoing discussion demonstrates that the attorneys' fee question decided by the Seventh Circuit merits this Court's review. And for the same reasons, review is warranted at this time. Under the mandate of the court of appeals, the district court has now approved a 1.6 multiplier. The court of appeals' decision thus has resulted in a complete reversal of the district court's final judgment and a substantial increase in the attorneys' fee award.

More generally, the court of appeals has held as a matter of law that a risk multiplier is available to compensate class action lawyers whose settlements create a monetary fund. The court's holding finally disposes of that legal issue, and it is that holding that is flatly inconsistent with this Court's decision in *Delaware Valley II* and with Congress's controlling policy. It is that holding that will sow confusion for courts and litigants alike under a wide variety of attorneys' fee provisions. And it is that holding that will increase the incentive for plaintiffs' attorneys to clog the courts with marginal lawsuits in the hope of recovering large multipliers, while spawning complex litigation over the collateral issue of attorneys' fees.[9]

Indeed, the court of appeals itself recently followed and expanded the decision below in *McGuire* v. *Sullivan*, No.

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[9] The court of appeals' decision already has been followed in other cases. See *In re Public Service Co. of Ind. Derivative Litig.*, Nos. IP-84-219-C and IP-84-358-C (S.D. Ind. Dec. 22, 1988) (awarding a risk multiplier of 1.55 to class counsel after settlement of a derivative suit resulting in a common fund); *In re Churchfield Mgt. & Inv. Corp.*, No. 84 B 7409 (Bankr. N.D. Ill. Mar. 7, 1989) (awarding a risk multiplier of 1.5 to two law firms in a bankruptcy class action resulting in a common fund); see also *Dutchak* v. *International Brotherhood of Teamsters*, Nos. 76 C 3803, 78 C 342, and 79 C 1725 (N.D. Ill. Apr. 6, 1989) (noting that the court of appeals in *Skelton* had "addressed favorably" risk multipliers in common fund cases).

88-1097 (7th Cir. Apr. 24, 1989). That case involved claims for disability benefits under the Social Security Act, which (like some 50 federal statutes, see page 4, *supra*) allows an award of a reasonable attorneys' fee payable out of the plaintiff's recovery. The federal government specifically argued that the principles of *Delaware Valley II* were applicable and precluded a risk multiplier even though the fees would be paid by the claimant rather than by the losing party; as it stated, "[t]he source of payment has nothing to do with the issues of fairness, attorney fee windfalls, and the unpredictable results addressed in *Delaware Valley II*" (Appellant's Br. 24). The Seventh Circuit rejected that argument, holding that a multiplier is authorized and citing its decision here for the broad proposition that "the lodestar may be enhanced for contingency" (slip op. 8; see also *id.* at 11). As a result, attorneys' fee multipliers—which constitute a windfall entirely unrelated to a lawyer's reasonable efforts expended in representing a client—will now be available to greatly reduce the statutory benefits of Social Security recipients.

In sum, further delay in resolving this critical legal question would serve only to subject the legal system to precisely the same undesirable consequences that this Court sought to avoid in *Delaware Valley II*. The court of appeals erred by initiating a "second major litigation" over the multiplier issue (*Hensley* v. *Eckerhart*, 461 U.S. at 437). This Court can bring this already protracted litigation to a close by reversing the court of appeals' decision and reinstating the original ruling of the district court, which properly awarded the $1.2 million in controversy to the consumer class members rather than to respondent law firms.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1989

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 87-1404, 87-1530 and 87-1610

ARLIE GLEN SKELTON, et al., on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLANTS

v.

GENERAL MOTORS CORPORATION, DEFENDANT-APPELLEE

Appeals of: Sachnoff, Weaver & Rubenstein, Ltd. and Law Offices of Beverly C. Moore, Jr.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 79 C 1243, 80 C 2151, and 85 C 4805—
John A. Nordberg, *Judge*

ARGUED JANUARY 13, 1988—DECIDED OCTOBER 14, 1988

Before BAUER, *Chief Judge*, and CUDAHY and COFFEY, *Circuit Judges*.

CUDAHY, *Circuit Judge*. This case arises out of a series of class actions brought against General Motors Corporation ("GM") for allegedly substituting less efficient engines and various other automotive parts (including transmissions) into certain lines of GM automobiles. The suits, brought in Illinois, New York and Washington, D.C., culminated when the consolidated class filed a complaint against GM in 1982 (for substituting less efficient transmissions in several lines of GM automobiles), under the Magnuson-Moss Warranty-Federal Trade Im-

provement Act, 15 U.S.C. §§ 2301-2312 (the "Magnuson-Moss Act"). The plaintiffs successfully petitioned the court for class certification and then settled with GM in 1985. Pursuant to the settlement, GM agreed to establish a $17 million fund to be distributed among the plaintiffs whose cars were affected by the substitution. As part of the settlement, the plaintiffs agreed that the fund would be the sole source of their attorneys' fees and that the fees would be calculated on an hourly rather than on a percentage-of-the-fund basis.

Class counsel submitted fee petitions based on the hours they expended multiplied by their hourly rate of payment. Counsel also requested a 75% enhancement of their fee awards to compensate for the risks undertaken in commencing this litigation. In denying the enhancement, the district court reasoned that the determination of a fee award under common fund principles is not significantly different than under a statutory fee-shifting provision. Thus, the district court held that the fee-shifting provision of the Magnuson-Moss Act is relevant to the award of fees in this case and that, under that provision, counsel are not entitled to an upward multiplier. The court alternatively concluded that, even if the Magnuson-Moss Act does not preclude the award of a multiplier, plaintiffs' counsel in this case are not entitled to a risk multiplier because the litigation never progressed beyond class certification.

I.

The issue presented by this case is whether the principles governing the shifting of attorneys' fees as between a plaintiff and a defendant are equally applicable to the division of a common fund recovery between a plaintiff class and its attorneys. The district court reasoned

> that the standards for determining reasonable attorneys fees in common fund cases and statutory fee

> cases should not be significantly different. In the court's view, the use of statutory fee guidelines is especially relevant where the litigation is commenced and prosecuted under a federal statute which specifically provides for an award of attorneys' fees.

Skelton v. General Motors Corp., 661 F. Supp. 1368, 1375-76 (N.D. Ill. 1987) (footnote omitted). But there are a number of reasons, based on the development of the respective doctrines and on the logic of the two problems, why these questions must be viewed separately. The factors which separate them are much more significant than those that link them.

Traditionally in the United States, parties to a lawsuit bear their own expenses. Thus, each litigant must pay its own attorneys' fees without regard to the outcome of the litigation. This has become known as the "American Rule." By contrast, for centuries British statutory authority has allowed an award of fees and costs to the prevailing party. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-64 (1975) (thoroughly discussing the history and present status of attorney fee awards). The American Rule continues to govern most of the cases in this country. However, there are many cases where the court may determine not only the amount of fees but which party shall pay them, based on statutory requirements or equitable doctrines. In some of these cases the court's determination may take the place of, supersede or modify fee agreements between a party and its counsel.

For example, Congress has created exceptions to the American Rule by inserting fee-shifting provisions in certain statutes. *See, e.g.*, 15 U.S.C. §§ 78i(e), 78r(a) (Securities Exchange Act of 1934); 15 U.S.C. § 1640(a) (Truth in Lending Act); 15 U.S.C. § 2310(d)(2) (Magnuson-Moss Act); 42 U.S.C. § 7604(d) (Clean Air Act); 42 U.S.C. § 2000a-3(b) (Civil Rights Act of 1964, Title

II); 42 U.S.C. § 2000e-5(k) Civil Rights Act of 1964, Title VII); 42 U.S.C. § 3612(c) (Fair Housing Act). Thus, a plaintiff that prevails in an action brought under a statute with a fee-shifting provision recovers the amount of its attorney's fee from the defendant.

In contrast, when a case results in the creation of a common fund for the benefit of a plaintiff class, a court will exercise its equitable powers to award plaintiffs' attorneys' fees out of the fund. *Alyeska*, 421 U.S. at 257-58. In this type of case, the defendant deposits a specified amount with the court for the benefit of the class in exchange for release of its liability. The attorneys' fee award is then taken as a share of the fund, thereby diminishing the sum ultimately retained by the plaintiff class. Similar to the way a plaintiff's attorney may be compensated by a contingent fee, a plaintiff class pays its attorneys by sharing its recovery with them.

Because there is a difference between statutory fee-shifting cases and common fund cases with respect, *inter alia*, to who bears the direct burden of compensating plaintiffs' attorneys, different policies may govern the two types of cases. The common fund doctrine (also known as the "equitable fund" doctrine and the "fund-in-court" doctrine) is "based on the equitable notion that those who have benefited from litigation should share its costs." Report of the Third Circuit Task Force, Court Awarded Attorney Fees 14 (Oct. 8, 1985), *reprinted in* Appendix of Appellants at 435, 453; *see Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Insurance Co. of N. America v. Norton*, 716 F.2d 1112, 1115-16 (7th Cir. 1983). Statutory fee-shifting provisions, in contrast, reflect the intent of Congress "to encourage private enforcement of the statutory substantive rights, be they economic or noneconomic, through the

judicial process." Report of the Third Circuit Task Force, Court Awarded Attorney Fees 15 (Oct. 8, 1985), *reprinted in* Appendix of Appellants at 454. Defendants who have violated plaintiffs' rights may be required to compensate plaintiffs for the costs incurred in enforcing those rights. Thus, in statutory fee-shifting cases, only parties (usually plaintiffs) may seek reimbursement whereas in common fund cases *attorneys* may seek compensation.

Another difference between the two types of court-awarded fee arrangements concerns the role of the plaintiffs' attorneys. In common fund cases, once the attorneys secure a settlement for the class, they petition the court for compensation from the same fund. Thus, their "role changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients' benefit." *Id.* at 20, *reprinted in* Appendix of Appellants at 459. The court becomes the fiduciary for the fund's beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing the fee applications. *See In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 583 (3d Cir. 1984) (fee requests from common fund are subject to "heightened judicial scrutiny"). Because statutory fee cases involve the plaintiff (not his attorney) as claimant and continue to be adversary proceedings, these concerns do not arise in the same way.

The district court in this case reasoned, however, that "regardless of any theoretical distinctions between common fund and statutory fee cases, the courts in this circuit employ the same general standards to calculate attorneys fees in both types of cases." *Skelton*, 661 F. Supp. at 1376. To the extent that, in this circuit, both fee arrangements generally require the court to employ the lodestar approach, this observation is correct. *See, e.g., Grekas v. Attorney Registration & Disciplinary Comm'n*, 793 F.2d 846 (7th Cir. 1986) (statutory fee case); *In re Folding Carton Antitrust Litigation*, 84

F.R.D. 245 (N.D. Ill. 1979). However, when a court must decide whether to compensate attorneys for the risks they incurred in undertaking the litigation, the difference between fee-shifting and common fund arrangements is quite significant.

Panels of this court—as well as commentators and other courts—have expressed the concern that awarding risk multipliers to prevailing plaintiffs in statutory fee cases may inequitably burden defendants. For example, risk multipliers tend to penalize the parties with the strongest defenses. The stronger the defense, the higher the risk involved in bringing the suit and the greater the multiplier necessary to compensate plaintiff's attorney for bringing the action. Thus, defendants with better cases pay higher plaintiff's attorney fees. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078, 3083, 3085 (1987); *Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986) ("One common concern with compensation for risk is that the multiplier should rise as the probability of success falls, soaking the unlucky defendant who had a good case (more than a 50% chance of prevailing) but lost anyway and therefore faced a huge multiplier."); *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 26 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985); Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 488-89 (1981). This consideration does not directly apply in a common fund case. A risk multiplier will not penalize a defendant with a strong defense since the plaintiff class (not the defendant) is responsible for compensating its attorney by sharing its recovery.

Further, assessing risk multipliers against losing defendants in effect requires these defendants to "subsidize" plaintiffs' lawyers for their unsuccessful lawsuits against other defendants. In statutory fee cases, this is "manifestly inconsistent with Congress' intent to award attorney's fees only to prevailing parties." *Delaware*

Valley, 107 S. Ct. at 3083; *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984) ("The fundamental problem of a risk bonus is that it compensates attorneys, indirectly but effectively, for bringing unsuccessful civil rights suits, even though the attorney's fee statute is expressly limited to cases where the party seeking the fee prevails."); *Laffey*, 746 F.2d at 34 n.138; Leubsdorf, *supra*, at 490. In a common fund case, however, this result cannot directly occur because the specific amount of the fee is charged against the plaintiffs, not the defendant; the defendant's liability is limited to the amount of the common fund, which is available to provide attorneys' fees.[1]

Therefore, the arguments—equitable and statutory—against risk multipliers in statutory fee cases have much less application in common fund cases.[2] This may be the reason that courts awarding fees in common fund cases generally do not express the same reluctance to compensate attorneys for the risk of nonpayment.

Although the Supreme Court has recently rejected the position that risk multipliers are prohibited in statutory fee cases, it has set forth stringent requirements for awarding them. *Delaware Valley*, 107 S. Ct. at 3090-91

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[1] GM argues that the settlement agreement's reverter clause ("Any portion of the settlement fund or accrued interest remaining after the distributions . . . shall revert to General Motors." Settlement Agreement ¶ 25) distinguishes this case from the typical common fund case. We disagree. In all common fund cases, the defendant has at least "a colorable claim" to any unclaimed monies. *See Boeing v. Van Gemert*, 444 U.S. 472, 481 & n.7 (1980). The significant feature that distinguishes common fund cases from statutory fee cases is that, in the former, defendants' potential liability has been limited.

[2] This circuit has also mentioned that risk multipliers provide "an incentive to pursue unmeritorious litigation." *Hagge v. Bauer*, 827 F.2d 101, 111 (7th Cir. 1987); *see also McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984).

(O'Connor, J., concurring in part and concurring in the judgment);[3] *see infra.* In a common fund case, where there is no direct or immediate danger of unduly burdening the defendant, a court has more latitude in exercising its equitable powers to determine whether the plaintiff class should compensate its attorneys for their risk of nonpayment. And it remains arguable that, at least in the common fund context, attorneys whose compensation depends on their winning the case, must make up in compensation in the cases they win for the lack of compensation in the cases they lose.

Thus, when a case is initiated under a statute with a fee-shifting provision and is settled with the creation of a common fund, the question may arise whether statutory fee principles should govern in whole or in part the attorney fee award. The district court in this case concluded that the fee-shifting provision of the Magnuson-Moss Act should have a significant impact on the determination of the fees awarded in this common fund case. *Skelton*, 661 F. Supp. at 1389. In the same vein, GM argues that because the plaintiffs sought relief under the

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[3] Justice O'Connor agreed with part of the reasoning of the four-vote plurality and with some of the arguments offered by the four-vote dissent. Her position on risk multipliers thus represents the position of a majority of the Court. Justice O'Connor agreed with the plurality that "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078, 3091 (1987) (O'Connor, J., concurring in part and concurring in the judgment) (quoting the plurality opinion, 107 S. Ct. at 3089). Justice O'Connor also observed that "'legal' risks or risks peculiar to the case" are not sufficient to warrant an enhancement of the lodestar. *Id.* (citing *Blum v. Stenson*, 465 U.S. 886, 898 (1984)). Thus, Justice O'Connor agreed with the dissent that "compensation for contingency must be based on the difference of contingent fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case." *Id.* at 3089.

Magnuson-Moss Act, its fee-shifting provision should control the award of their attorneys' fees. These conclusions are incorrect and insupportable. Neither the Magnuson-Moss Act itself nor cases involving common funds and other fee-shifting statutes lead us to conclude that the fee-shifting provision of the Magnuson-Moss Act should affect the fee determination in this case, which was settled, resulting in a common fund.[4]

When a case results in a common fund, courts generally follow the "equitable fund doctrine" in determining the attorney fee award. *See Van Gemert*, 444 U.S. at 478 ("The common fund doctrine reflects the traditional practice in courts of equity."); F. MacKinnon, *Contingent Fees for Legal Services* 148 (1964) ("payment of fees by the court from a common fund is standard practice in all jurisdictions"). In current practice, the court exercises its equitable powers by first calculating the lodestar, taking into consideration number of hours and how they were spent and the "value of each attorney's services to the class." *In re Fine Paper*, 751 F.2d at 583. Next, the court may adjust the lodestar to reflect the "contingent nature of the attorney's under-

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[4] The Third Circuit Task Force concluded that:

> The traditional common-fund case *and those statutory fee cases that are likely to result in a settlement from which adequate counsel fees can be paid,* should be treated differently than the more typical statutory fee case involving the declaration or enforcement of rights or relatively modest sums of money.

Report of the Third Circuit Task Force, Court Awarded Attorney Fees 21 (Oct. 8, 1985), *reprinted in* Appendix of Appellants at 435, 460 (emphasis added). The Task Force ultimately recommended that whenever a settlement fund is created, attorneys' fees should be awarded on a percentage, rather than on an hourly basis. *Id.* Although there are certainly grounds for believing that a percentage fee arrangement would be more efficient than the current approach (of calculating a lodestar and then determining an enhancer, where appropriate), we will not overturn what seems to have become the accepted method of determining fees in this circuit.

taking."[5] *Id.* This requires the court to assess the "likelihood of success in obtaining a judgment or settlement," as measured at the time the attorney began work on the case. *Id.* Thus, where appropriate, equitable fund principles allow for an upward adjustment of the lodestar.

Even in cases initiated under statutes containing fee-shifting provisions, other circuits have applied common fund principles to determine attorneys' fees when resolution of disputes results in the creation of common funds. *See, e.g., In re Fine Paper*, 751 F.2d 502; *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). The Second Circuit, in an antitrust class action that resulted in a $10 million settlement explained that it must use common fund principles to determine attorneys' fees because

> the Clayton Act, which provides for the award of attorneys' fees in civil antitrust suits generally, does not authorize award of attorneys' fees to a plaintiff who does not recover a judgment or who settles his claim with the defendant. . . . The only basis for awarding an attorney's fees in such cases is the equitable fund theory doctrine . . . .

Id. at 468-69 (citations omitted). Recognizing that this doctrine is a part of the federal court's equity jurisdic-

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[5] The Third Circuit also allows an upward adjustment of the lodestar to compensate attorneys for the delay in payment, when litigation extends over several years, and for the quality of the representation. *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 583-84 (3d Cir. 1984). Whether the lodestar should be adjusted to account for any of these factors is not at issue in this case. In any event, a multiplier may not be the best method for compensating attorneys for the superior quality of their work. This should be reflected in the lodestar in the form of a high hourly rate. Delay in payment may be compensated in either of two ways: (1) by using the attorneys' current rates (as the district court did here); or (2) by using historical rates plus a prime rate enhancement. The courts in this circuit generally use current rates. *See Skelton v. General Motors Corp.*, 661 F. Supp. 1368, 1382 & n.18 (N.D. Ill. 1987).

tion, the Second Circuit described its underlying rationale as follows:

> Under this theory claims may be filed not only by a party to the litigation, but also by an attorney whose actions conferred a benefit upon a given group or class of litigants. The underlying principle here is that the members of the group should pay "compensation as was reasonable" above and beyond reimbursement for out-of-pocket expense to the attorney representing their interests.

Id. at 469.

The Third Circuit more recently explained its position in a similar case. *In re Fine Paper* involved a class action brought under the Clayton Act, 15 U.S.C. §§ 15, 26, to enforce the Sherman Act, 15 U.S.C. § 1. The lawsuit was settled and the defendant created a fund "in exchange for [its] release . . . from liability both for damages and for statutorily authorized fees." 751 F.2d at 582. The Third Circuit noted that in settling class actions brought under statutes containing fee-shifting provisions, there are two approaches for awarding plaintiffs' attorneys' fees. A court might take the position that damages to the class must be settled separately. Once a fund is created to compensate the plaintiff class for its damages, the court can "either entertain litigation or consider a separate settlement of the defendant['s] liability for statutory fees." *Id.* at 582. Alternatively, the court may allow a single settlement that releases the defendant from both damage and statutory fee liability. The district court in the present case opted for the latter approach. Although this approach creates a potential conflict of interest between class counsel and class members, who are now competing for the same money, it has the possible advantage of facilitating the settlement of class actions. *Id.* at 582-83. The Third Circuit described this second approach as the "conversion" of a statutory fee case into a common

fund case. *Id.* at 583. Regardless whether we choose to adopt the "conversion" characterization, it is clear that, when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorneys' fees, equitable fund principles must govern the court's award of the attorneys' fees. *See id.* at 582-84; *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 164-65 (3d Cir. 1973).

Moreover, looking specifically at the Magnuson-Moss Act, the fee-shifting provision, by its terms, does not purport to apply to a fee determination in a case settled in a common fund. The provision provides for the award of attorney's fees as part of the *judgment* if the consumer "finally prevails" in an action brought under the statute.[6] 15 U.S.C. § 2310(d)(2). Nor is there any evidence in the legislative history of Congress' intent to apply the fee-shifting provision to common fund or settlement cases of any kind.[7]

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[6] Section 2310(d)(2) provides:

> If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such award of attorneys' fees would be inappropriate.

15 U.S.C. § 2310(d)(2).

[7] With respect to the fee-shifting provision of the Magnuson-Moss Act, Congress made only the following remarks:

> Subsection (c) of section 110 provides for the recovery of court costs and reasonable attorney's fees in the event a "purchaser," as defined in Title I, is successful in a suit for breach of an express or implied warranty or service contract obligation. This provision would make it economically feasible for consumers to pursue their remedies in state courts. It should be noted that an attorney's fee is to be based upon actual

Even in cases in which the Magnuson-Moss Act is applicable to the fee award (as it would have been had the plaintiff class won a judgment against GM), the fee-shifting provision does not prevent the court from awarding risk multipliers.[8] The district court recognized that this circuit has in recent years disfavored awarding fee enhancers in statutory fee cases.[9] As we noted above, however, the Supreme Court has since squarely addressed this issue. In *Delaware Valley*, a group of citizens had prevailed in an action under the Clean Air Act, 42 U.S.C. § 7410. Fees were awarded to the plaintiffs (not directly to their attorneys) under the fee-shifting provision of the Act, *id.* § 7604(d). The defendant appealed the district court's enhancement of the fee award to compensate the

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> time expended rather than being tied to any percentage of the recovery. This requirement is designed to make it economically feasible to pursue consumer rights involving inexpensive consumer products. Of course where small claims courts are available, the Committee encourages their use; and to the extent legal representation is not necessary in such courts, attorney's fees would probably not be available.

S. Rep. No. 986, 92d Cong., 1st Sess. 21, 117 Cong. Rec. 39614 (1971).

[8] As noted above, *see supra* p. 4, statutory fee-shifting provides an award to the *plaintiff*. Arguably at least, the arrangements of the plaintiff with its attorneys may differ.

[9] To the extent that this circuit has previously taken a position disfavoring risk multipliers in fee-shifting cases, *see, e.g., McKinnon*, 750 F.2d at 1392, we appear to be withdrawing from that position. *See Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986) ("Increasing hourly rates for risk and delay is one way of restoring the hourly rate a lawyer could obtain from a paying client, and a necessary way when the base of the fees must be the hourly rate."); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 661 (7th Cir. 1985) ("We do not mean to imply that a multiplier for the contingent nature of success is inappropriate when lawyers bear the risk of nonpayment and the delay in payment."). *But see Hagge*, 827 F.2d at 111 (risk of loss is not a basis in this circuit for enhancing lodestar; Supreme Court has yet to decide this issue).

plaintiffs' attorneys for assuming the risk of loss through nonpayment. Justice O'Connor, casting the deciding vote, agreed with the plurality that the circumstances of *Delaware Valley* did not warrant the award of a risk multiplier. She agreed with the dissent, however, "that Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions." 107 S. Ct. at 3089 (O'Connor, J., concurring in part and concurring in judgment).

In light of the *Delaware Valley* decision, we cannot adopt the position that risk multipliers are prohibited in all statutory fee-shifting cases. GM contends, however, that the express language of the fee-shifting provision of the Magnuson-Moss Act prevents courts from awarding fee enhancers. This provision provides that attorneys' fees should be "based on actual time expended." 15 U.S.C. § 2310(d)(2). *See supra* note 6. In our view, these words do not preclude a risk multiplier. Instead, they indicate Congress' intent that attorneys' fees be computed on an hourly basis "rather than being tied to any percentage of the recovery." S. Rep. No. 986, 92d Cong., 1st Sess. 21, 117 Cong. Rec. 39614 (1971). *See supra* note 7. Because a risk enhancer is applicable to the lodestar—it multiplies the lodestar by a number representing the probability of loss—it is based on the number of hours the attorneys worked and not the size of plaintiffs' recovery. Thus a risk multiplier is "based on actual time expended."

II.

Having concluded that plaintiffs' counsel are not precluded from seeking a fee enhancer to compensate for contingency we turn to the question whether under the circumstances of this case they are entitled to the risk multiplier they seek. The district court held that a risk multiplier is unnecessary to fully compensate the attorneys because "the action never proceeded very far beyond the initial pleading stages." *Skelton*, 661 F. Supp. at 1392.

The district court's determination of reasonable attorney fees, including its decision whether to award a risk multiplier, generally is reviewed only for abuse of discretion. *See In re Illinois Congressional Districts Reapportionment Cases*, 704 F.2d 380, 382 (7th Cir. 1983); *Swanson v. American Consumer Indus., Inc.*, 517 F.2d 555, 562 (7th Cir. 1975) ("That abuse of discretion is the general standard for review of trial court awards of attorneys' fees under the 'fund' theory . . . is well established."). We will, however, overturn a fee award that is based on an error of law. *Lynch v. City of Milwaukee*, 747 F.2d 423, 426 (1984); *see also Spanish Action Comm. of Chicago v. City of Chicago*, 811 F.2d 1129, 1134 (7th Cir. 1987).

Here the district court erred in basing its denial of a risk multiplier on the fact that the parties settled at a relatively early stage in the litigation. The point at which plaintiffs settle with defendants (or win a judgment against defendants) is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them. *See In re Fine Paper*, 751 F.2d at 583 (risk should be "measured at the point when the attorney's time was committed to the case"). In the present case (as in all similar cases), the early settlement is reflected in the lodestar-plaintiffs' counsel worked fewer hours than they would have if the case had gone to trial.

Because we conclude that early settlement is an insufficient basis for denying a risk multiplier, we remand this case to the district court to consider whether class counsel are entitled to compensation for incurring the risk of nonpayment.

We fully realize the difficulty of this undertaking. The district court must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of the class members in the fund. *See* Comment, *Adjusting At-*

torney Fee Awards Through Multipliers in Antitrust Class Actions, 21 Hous. L. Rev. 801, 812 (1984). Nevertheless, when attorneys' receipt of payment is contingent on the success of the litigation, reasonable compensation may demand more than the hourly rate multiplied by the hours worked, for that is exactly what the attorneys would have earned from clients who agreed to pay for services regardless of success. Thus, to account for the contingent nature of the compensation, a court should assess the riskiness of litigation. This task is not without its problems. First, it entails a retroactive calculation of the probability of success as measured at the beginning of litigation. Second, it places plaintiffs' lawyers in the unseemly position of convincing the court that their clients' case was weak. For these reasons (and others) it has been suggested that a standard risk multiplier be used in all contingent fee arrangements. *See* Leubsdorf, *supra* p. 6, at 511 (suggesting that "lawyers in successful cases receive a fee twice what they would have received from clients whose payment is not contingent on success").

Despite the problems related to subjectiveness inherent in the determinaion of a risk muliplier, the district court, familiar as it is with the nature of the litigation, should retain discretion to decide if and to what extent the plaintiffs' counsel should be compensated for risk. It may be that a doubling of the lodestar would provide a sensible ceiling. It would certainly address the concern that extremely risky cases (those bordering on the frivolous) not warrant extremely large risk multipliers. Since class counsel here have requested an amount less than double their lodestar we need not decide this definitively. Thus, we instruct the district court to examine plaintiffs' attorneys' reasons for asserting that this class action was a risky undertaking and to determine whether these reasons justify the 75% multiplier they seek (or some multiplier less than that).

III.

One of the plaintiff's attorneys, Beverly C. Moore, Jr., appeals the district court's determination of his lodestar award of $396,813.32. GM argues that the settlement agreement, which the court approved in a separate order on the same day that it awarded Moore's lodestar, precludes Moore from seeking appellate review of the court's determination of his lodestar. We agree with GM.

The settlement agreement creates a $17 million fund, from which compensation for plaintiffs' attorneys must be taken. The agreement contains a section that describes in detail how costs and expenses, including attorney fees, were to have been recovered. This section requires plaintiffs' attorneys to file with the district court a petition for fees and costs incurred in the litigation based on compensation for actual hours spent (the "lodestar") and reimbursement for actual costs and expenses. This section further states that "[b]oth parties agree not to seek appellate review of any determination of the lodestar figure or actual costs and expense." Settlement Agreement ¶ 34, Appendix of Appellants at 102.

In direct contradiction of the Settlement Agreement, Moore makes such an appeal. He contends that because he is not a party to the Settlement Agreement, he is not bound by its terms. His claim is two-fold: first, he never signed the agreement; second, the attorneys are not the "parties" to the agreement. We do not accept either argument.

Although Moore was not a signatory to it, his conduct binds him to the agreement. *See Soelzer v. Soelzer*, 382 Ill. 393, 399, 47 N.E.2d 458, 460 (1943) (acts and conduct of adopting parent validated unsigned adoption contract); *Amelco Elec. Co. v. Arcole Midwest Corp.*, 40 Ill. App. 3d 118, 125-26, 351 N.E.2d 349, 354 (1976) (subcontractor who did not sign contract was bound because

he did not object to its terms and acted on it).[10] Pursuant to the settlement agreement, Moore, along with the other attorneys, petitioned the district court for their fees and expenses. Moore joined the other attorneys in participating in the October 30, 1986 fairness hearing on the settlement agreement and in the November 10, 1986 hearing on attorneys' fees, which was a continuation of the fairness hearing. Thus, although Moore never signed the agreement, he followed its procedures. Moreover, Moore never filed an objection to the settlement agreement. And, most important, he tried his case and accepted his award. A party may become bound to a contract by accepting its benefits, even though he did not sign it. *Bi-County Properties v. Wampler*, 61 Ill. App. 3d 799, 805, 378 N.E.2d 311 (1978) ("Conduct, including an acceptance of benefits under a contract, may be sufficient to constitute a ratification binding on the party accepting the benefits as if he had signed the contract."). Clearly, the settlement agreement is a contract. *See Airline Stewards & Stewardesses Assoc., Local 550 v. Trans World Airlines, Inc.*, 713 F.2d 319, 321 (7th Cir. 1983) (a settlement agreement is a "contract and as such the construction and enforcement of settlement agreements are governed by principles of local law applicable to contracts generally"). Moore accepted the benefits of the contract when he cashed his check. He cannot obtain the *quid* of the settlement agreement and avoids the *quo* of foregoing his right to appeal.

We also reject Moore's contention that because the attorneys are not "parties" to the Settlement Agreement, the promise not to seek appellate review does not apply to them. Although the Settlement Agreement defines parties as "plaintiffs and defendant General Motors," Settlement Agreement ¶ 1, Appendix of Appellants at 77, the section governing costs and fees clearly binds the attorneys. Drafted in a less-than-perfect manner, that sec-

[10] The Settlement Agreement provides that Illinois law should govern its construction.

tion uses the term "parties" interchangeably with "plaintiffs' counsel":

> Both *parties* agree not to seek appellate review of any determination of the lodestar figure or actual costs and expenses. Both *parties* reserve the right to seek appellate review of the question whether the Court may grant any multiplier or other enhancement of the lodestar figure . . . . In the event of an appeal by General Motors or the *plaintiffs' counsel* as to the question whether the Court may grant any multiplier . . . *plaintiffs' counsel* may apply to the Court for interim payment of costs and expenses . . . .

Id. ¶ 34, Appendix of Appellants at 102 (emphasis added). Our interpretation of this somewhat confusing paragraph is that plaintiffs' counsel and GM have relinquished their right to appeal the lodestar determination. The intent of the language taken in context seems to be to preserve the right of General Motors or of plaintiffs' counsel (the two who apparently had an expressed interest) to challenge on appeal a holding that there could be or that there could not be, respectively, a multiplier. Closely linked with this is a renunciation by all concerned of a right to appeal the lodestar. Perhaps these provisions were tailored primarily to the presumed needs of counsel other than Moore. But Moore has not indicated that he objected specifically to this loss of appeal rights. Through his conduct Moore bound himself to this part of the agreement.

Finally, Moore argues that because the district court's fee award is not actually based on the settlement agreement, he retains his right to appeal the award. This case, however, began when the attorneys petitioned for fees and expenses in accordance with the terms of the Settlement Agreement. Even though these terms do not include a specific amount for attorneys' fees, they do provide for the court's determination of attorneys' fees. Thus, without

the Settlement Agreement, Moore and the other attorneys would have had no basis for obtaining their fees.

We will not allow Moore to have it both ways. He cannot accept the benefits of the Settlement Agreement and avoid the burden of agreeing not to appeal. Moore has waived his right to appellate review as stated in the Agreement. We thus affirm the district court's determination of Moore's lodestar figure.

IV.

For all the reasons stated, the district court's attorney fee awards are

AFFIRMED IN PART,
REVERSED IN PART
AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 1243

Judge John A. Nordberg

ARLIE G. SKELTON, JR., *et al.*, PLAINTIFFS,

v.

GENERAL MOTORS CORPORATION, DEFENDANT.

No. 80 C 2151 and Consolidated Cases

Judge John A. Nordberg

JOSEPHINE NEWTON, *et al.*, PLAINTIFFS,

v.

GENERAL MOTORS CORPORATION, DEFENDANT.

[February 11, 1987]

MEMORANDUM OPINION AND ORDER

In these consolidated class actions, the plaintiffs sued General Motors Corporation ("GM") for damages stemming from GM's installation of THM 200 transmissions into automobiles which allegedly required a THM 350 transmission. The parties entered into a comprehensive settlement agreement, which this court has approved in a

separate order entered on this date.[1] The settlement order did not determine the appropriate award of attorneys' fees for class counsel. The court has received fee petitions from nine law firms requesting attorneys' fees in connection with this action.[2] The class counsel seeks an aggregate "lodestar" amount of $3.3 million, and a 1.75 multiplier. The total fees and expenses requested amount to approximately $5.9 million.

After consideration of all the facts and circumstances, including reviewing the very extensive briefs and petitions and conducting a hearing on November 10, 1986, the court finds that the amounts set forth below provide the appropriate compensation for class counsels' efforts in this litigation.

The court has reduced both the hours and attorney fee rates sought by all attorneys for the reasons set forth in this opinion. However, in this court's opinion, the court has allowed reasonable hours and reasonable attorney fee rates so that all counsel shall be properly compensated for their legal efforts in the consolidated cases. The court's determination of the reasonable hours and rates for each fee petitioner is set forth at the end of this opinion.

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[1] The settlement dismisses the following actions: *Skelton v. General Motors Corp.*, No. 79 C 1243 (*"Skelton"*); *Newton v. General Motors Corp.*, No. 80 C 2151 (*"Newton"*); *Fritz v. General Motors Corp.*, No. 85 C 4805 (*"Fritz"*); *Morgan v. General Motors Corp.*, No. 81 Civ. 0280 (S.D.N.Y.) (*"Morgan"*); and *Attard v. General Motors Corp.*, No. 21558/79 (Supreme Court of the State of New York) (*"Attard"*).

[2] The fee petitioners are Charles A. Boyle & Associates, Ltd.; Corinblit & Seltzer; Abraham N. Goldman & Associates, Ltd.; Goodkind, Weschler, Labaton & Rudoff; Francis E. Goodman, P.C.; William J. Harte, Ltd.; Law Offices of Beverly C. Moore, Jr.; Sachnoff, Weaver & Rubenstein, Ltd.; and Zwerling, Schacter and Zwerling.

Procedural History

This litigation originated in the *In re General Motors Engine Interchange Litigation*, MDL No. 308 (N.D. Ill.), *rev'd*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S.Ct. 146 (1979), *aff'd after remand*, 620 F.2d 1190 (7th Cir. 1980) (the "*Engines*" case). In *Engines*, the plaintiffs alleged that GM violated the written warranty provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312, by substituting different engines and other automotive parts, including transmissions, into certain lines of GM automobiles. Specifically, the *Engines* plaintiffs complained that GM had installed Chevrolet engines in 1977 Oldsmobiles, and THM 200 transmissions in automobiles which were supposed to be equipped with a THM 350 transmission. *See Engines*, 594 F.2d at 1114, 1132, n.44. On remand, Judge McGarr, who presided over the *Engines* litigation, separated the transmissions claims, and ruled that the case would proceed only on the engine interchange issues.

In response to Judge McGarr's decision, plaintiffs filed the *Skelton* action on March 29, 1979. An amended complaint was filed two months later. Although the *Skelton* complaint was patterned after the written warranty claims in the *Engines* litigation, it also contained allegations of deceptive warranties and breach of implied warranties. The *Newton* claims were filed approximately one year after *Skelton*, and alleged a different theory of liability stemming from GM's substitution of the THM 200 transmission. These plaintiffs alleged that GM's conduct in replacing the THM 350 transmission with a THM 200 transmission violated the implied warranty provisions contained in UCC § 2-314(2)(c) because the substituted transmissions were not "fit for their ordinary purpose."

During approximately the same time frame, two other groups of plaintiffs instituted similar litigation in New York. The *Attard* action was filed in New York state

court in 1979, and the *Morgan* action was filed in the New York federal district court in 1981. These complaints alleged that GM's conduct constituted a breach of its implied and express warranties in violation of the UCC and the Magnuson-Moss Warranty Act.

In 1979, GM moved to dismiss the *Skelton* complaint, which was then pending before Judge John Powers Crowley. The case was transferred to Judge Moran, and the parties rebriefed the pending motion to dismiss. On October 1, 1980, Judge Moran issued an opinion which upheld plaintiffs' written warranty claim, and dismissed the implied warranty and defective warranty claims. *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1190-95 (N.D. Ill. 1980). GM filed an interlocutory appeal, which was accepted by the Seventh Circuit. While *Skelton* was on appeal to the Seventh Circuit, the *Skelton* plaintiffs amended their complaint to include the *Newton* merchantability claims, and GM filed a motion to dismiss all the remaining *Skelton* and *Newton* claims.

In September of 1981, the Seventh Circuit issued its opinion in *Skelton*, reversing Judge Moran's recognition of a written warranty claim based on GM's substitution of the THM 200 transmissions for THM 350 transmissions. *Skelton v. General Motors Corp.*, 660 F.2d 311 (7th Cir. 1981). The Seventh Circuit denied plaintiffs' request for a rehearing and rehearing en banc on December 11, 1981; and the Supreme Court subsequently denied plaintiffs' petition for certiorari. *Skelton v. General Motors Corp.*, 456 U.S. 974, 102 S.Ct. 2238 (1982).

The *Skelton* and *Newton* plaintiffs filed a consolidated complaint under Magnuson-Moss shortly after the Seventh Circuit issued its opinion. The cases were then transferred to Judge Getzendanner, who accepted supplemental briefs and heard oral argument on the motion to dismiss. The cases were transferred to this court a few months later. At the time of this transfer, the par-

ties were still involved in the process of investigating and briefing issues regarding their class certification motions. This process included hiring experts, taking some depositions and responding to numerous inquiries regarding the class action.[3] In addition, due to the continuous development of the law in this area, the parties were often required to supplement their certification briefs to address the most recent decisions regarding class certification in cases of this subject and magnitude.

During this same time period, significant developments were taking place in New York and Washington, D.C. In New York, the *Attard* court denied GM's motion to dismiss, and was affirmed by the New York appellate court. Counsel proceeded with class certification motions and discovery in both *Attard* and *Morgan*; and then agreed to informally stay these proceedings pending the outcome of the *Skelton/Newton* class certification motions before this court. In Washington, GM was involved in an administrative action conducted by the Federal Trade Commission ("FTC"). The parties engaged in extensive discovery during the course of the FTC investigation, and subsequently entered into a consent decree settling the administrative action in November of 1983. This settlement, which was opposed by the *Skelton/Newton* plaintiffs, provided for the establishment of a Mediation and Arbitration program to resolve consumer complaints stemming from the operation of GM automobiles.[4]

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[3] The Magnuson-Moss Warranty Act, which provided federal jurisdiction, contains a one-hundred plaintiff rule for class actions instituted pursuant to its provisions. 15 U.S.C. § 2310(d)(3)(C). This unique requirement necessitated considerable expenditures of time both before and after this court's order certifying the "failures" class.

[4] This Mediation and Arbitration Board, which operates in conjunction with the Better Business Bureau, has awarded over $30 million to aggrieved consumers since its inception in 1983.

In 1984, the *Skelton/Newton* plaintiffs suggested that the court proceed with an initial certification of a "failures" class. This court issued an interim order on December 20, 1984, which revealed the court's intent to certify a "failures" class under Count I of the complaint. The court declined to certify any other classes at that time. The court also held that state privity law was applicable to the Magnuson-Moss cause of action. *Skelton v. General Motors Corp.*, No. 79 C 1243, Slip op. at 3 (N.D. Ill. Dec. 20, 1984). In addition, it denied GM's motion to dismiss plaintiffs' label and latent defect claims (Counts III and IV of the consolidated complaint). *Id.*

The parties began discussing the possibility of settlement following the issuance of this interim order. These discussions extended throughout 1985, and included conferences both in and out of court. After extensive negotiations, the parties reached a general agreement in December of 1985. They expended considerable time negotiating and drafting the final provisions of this agreement, which were presented to the court on June 16, 1986. The Agreement encompasses the following class of plaintiffs:

> All original owners (other than solely for purposes of resale) of a General Motors 1976-1980 model year vehicle equipped with a THM 200 transmission purchased in the United States, its possessions and territories, or the District of Columbia, who incurred any transmission repair expense within the first 50,000 miles of use of that vehicle.

In this settlement, GM agreed to establish a $17 million fund which will provide reimbursement for transmission service and repair costs incurred by plaintiffs in the "failures" class.[5] The parties agreed that the fund

[5] The settlement agreement also provides for an additional $2.5 million to be deposited by GM in the event that the plaintiffs' claims deplete the $17 million already deposited.

would be the only source of any attorneys' fees sought by plaintiffs' counsel, and that plaintiffs' counsel would not seek a fee award calculated on a percentage-of-recovery basis. In accordance with this agreement, plaintiffs' counsel have submitted timesheets and expense reports which reflect the hours of work devoted to this litigation.

Motion For Attorneys' Fees

Initially, the court must determine the source of its authority to award attorneys' fees in this action. The class counsel argues that fees should be awarded under the "common fund" doctrine, which permits an award of attorneys' fees where a litigant or his attorney recovers a common fund for the benefit of persons other than himself or his client. *See generally Boeing v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745 (1980); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616 (1970). In contrast, GM argues that these fee petitions should be scrutinized under the attorneys' fee provision set forth in the Magnuson-Moss Warranty Act [6] and the Supreme Court and Seventh Circuit caselaw pertaining to statutory fee awards. *See generally Pennsylvania v. Delaware Valley Citizens' Council*, 106 S.Ct. 3088 (1986); *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 776 F.2d 646 (7th Cir. 1985).

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[6] This section provides:

> If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

15 U.S.C. 2310(d)(2).

In the court's view, the plaintiffs have exaggerated the difference between calculating fees pursuant to the common fund doctrine as opposed to a statutory fee provision. An award of fees under the common fund doctrine is an equitable practice which "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing*, 444 U.S. at 478, 100 S.Ct. at 749. The doctrine enables the court to offset this inequity "by assessing fees against the entire fund, thus spreading fees proportionately among those benefitted from the suit." *Id.* In addition to this unjust enrichment rationale, the common fund doctrine also contains an "incentive" rationale: by permitting an award of fees in these cases, the doctrine operates to encourage attorneys to engage in litigation which benefits certain groups of people who could not otherwise obtain representation for their interests. *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 255, 262 (N.D. Ill. 1979); *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1356 (N.D. Ill. 1974); *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 614 (D. Colo. 1974). *See* Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 476 (1981).[7] Although statutory fee awards are not based on an unjust enrichment principle, they contain the same "incentive" rationale as the common fund doctrine. *Pennsylvania v. Delaware Valley Citizens Council*, 106 S.Ct. at 2098 (1986) ("the aim of [fee-shifting] statutes [is] to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws."). *See* Leubsdorf, *supra*, at 477.

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[7] *See generally* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv.L.Rev. 849 (1975); Dawson, *Attorneys and Involuntary Clients: Attorney Fees From Funds*, 87 Harv.L.Rev. 1597 (1974).

Given this commonality of purpose, this court finds that the standards for determining reasonable attorneys' fees in common fund cases and statutory fee cases should not be significantly different.[8] In the court's view, the use of statutory fee guidelines to determine a proper fee award is especially relevant where the litigation is commenced and prosecuted under a federal statute which specifically provides for an award of attorneys' fees. When parties settle a case involving statutory fees, the amount ultimately awarded should not be dependent upon whether the fees are assessed directly against the defendant, or against a fund created by the defendant. *See* Leubsdorf, *supra*, at 489. Thus, although there may be theoretical distinctions between the common fund doctrine and statutory fees, these distinctions are not so great that they justify the use of completely different standards when calculating an award of attorneys' fees in a particular case.[9]

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[8] *See* Federal Judicial Center, Attorneys' Fees in Class Actions 4-11 (1980) (discussing the considerations for awarding attorneys' fees without mentioning a distinction between fund cases and statutory fee cases).

[9] If anything, the distinction between common fund fee awards and statutory fee awards may justify heightened judicial scrutiny because the fee will be paid out of a fund in which the defendant has only a contingent interest, and the plaintiffs' attorneys' interests conflict with the interests of the fund's beneficiaries. A recent discussion of the distinctions between common fund and statutory fee awards has suggested that the nature of a common fund award may actually necessitate greater judicial scrutiny of the fee petitions. Third Circuit Task Force, *Court Awarded Attorney Fees*, 15 (October 8, 1985). *See also City of Detroit v. Grinnell*, 495 F.2d 448, 469 (2d Cir. 1974), where the court noted:

> Courts must always heed the admonition of the Supreme Court in *Trustees v. Greenough* [105 U.S. 527, 536 (1881)] when it advised that fee awards under the equitable fund doctrine were proper 'if made with moderation and a jealous regard to the rights of those interested in the fund.'

The Third Circuit Task Force recommends a specific procedure in common fund and statutory fee cases; however, this procedure—

Furthermore, regardless of any theoretical distinctions between common fund and statutory fee cases, the courts in this circuit employ the same general standards to calculate attorneys' fees in both types of cases. In *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997, 96 S.Ct. 2214 (1976), a Title VII case, the court adopted the guidelines for attorneys' fees set forth in Rule 2-106 of the Code of Professional Responsibility:

1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;

2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3) Fees customarily charged in the locality for similar legal services;

4) The amount involved and the results obtained;

5) Time limit imposed by the client or the circumstances;

6) The nature and length of the professional relationship with the client;

7) The experience, reputation and ability of the lawyer or lawyers performing the services; and

8) Whether the fee is fixed or contingent.[10]

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which involves a percentage fee arrangement—is impossible in this case because the plaintiffs have agreed not to seek fees based on such a calculation.

[10] These factors were routinely used in common fund cases long before the advent of statutory fee provisions. *See In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 255-56 (N.D. Ill. 1979) (tracing articulation of these standards to *In re Osofsky*, 50 F.2d 925, 927 (S.D. N.Y. 1931)). More recently, the Seventh Circuit has indicated that use of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.

The courts in this circuit have reiterated these factors in both common fund and statutory fee cases. *See, e.g., Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1249 (7th Cir. 1982) (antitrust); *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 585 (7th Cir. 1981) (patent); *Mills v. Eltra*, 663 F.2d 760, 762 (7th Cir. 1981) (common fund); *Muscare v. Quinn*, 614 F.2d 577, 579 (7th Cir. 1980) (42 U.S.C. § 1988); *Gross v. Schweiker*, 503 F.Supp. 260, 262 (N.D. Ind. 1983) (EAJA-28 U.S.C. § 2412); *Kennedy v. Nicastro*, 546 F.Supp. 267, 270 (N.D. Ill. 1982) (shareholders' derivative action); *Zilker v. Klein*, 540 F.Supp. 1196, 1199 n.8 (N.D. Ill. 1982) (shareholders' derivative action); *United States v. Vague*, 521 F.Supp. 147, 152 (N.D. Ill. 1981) (criminal); *Will v. United States*, 90 F.R.D. 336, 338 (N.D. Ill. 1981) (common fund); *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 255-56 (N.D. Ill. 1979) (common fund); *Arenson v. Board of Trade*, 372 F.Supp. 1349, 1351 (N.D. Ill. 1974) (common fund). *See also In re Warner Communications Securities Litigation*, 618 F. Supp. 735, 746-47 (S.D.N.Y. 1985); *Phemister v. Harcourt-Brace Jovanovich, Inc.*, 1984-2 Trade Cases ¶ 66,234 at 66,995 (N.D. Ill. 1984); *In re Cenco Inc. Securities Litigation*, 519 F.Supp. 322, 325-26 (N.D. Ill. 1981); *In re Clark Oil Antitrust Litigation*, 422 F.Supp. 503, 511 (E.D. Wis. 1977); *Liebman v. Peterson Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1974) (discussing similar factors in determining fee awards from common fund). Not all factors apply in a given case,[11] and no one factor is controlling.[12]

1974), is appropriate. *Lynch v. City of Milwaukee*, 747 F.2d 423, 427 (7th Cir. 1984). These factors are similar to the factors cited in the Code of Professional Responsibility. *Johnson*, 448 F.2d at 719; *Lynch*, 747 F.2d at 427.

[11] In the court's opinion, the second, fifth and sixth factors have little, if any, relevance to the request for fees in this case.

[12] In addition, since several of these factors may overlap, the determination of one factor may also resolve issues pertaining to

As the first factor indicates, the starting point in the court's analysis involves a determination of the number of hours reasonably expended on the litigation. This figure is then multiplied by the fees customarily charged in the locality for the services rendered to produce the "lodestar" figure. *Waters*, 502 F.2d at 1322. *See also Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983); *In re Cenco Inc. Securities Litigation*, 519 F.Supp. 322, 325-26 (N.D. Ill. 1981). After calculating the lodestar, the court may add an upward adjustment, or multiplier, to ensure that the fee award provides appropriate compensation to the plaintiffs' counsel for the work performed and the results achieved. GM has filed specific objections to the nine sets of timesheets submitted by plaintiffs' counsel. The court will discuss these objections in its review of the individual petitions, *infra*. Before launching into a discussion of the individual petitions, however, the court will address several recurring objections to the majority of the petitions.

1. *Time Spent on Alleged "Lost" and "Abandoned" Claims*

GM argues that the hours claimed by plaintiffs' attorneys should be reduced to account for the unsuccessful appeal to the Seventh Circuit in *Skelton* and the claims allegedly abandoned in the course of the settlement negotiations. In *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940 (1983), the Supreme Court held:

> work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' *Davis v. County of Los Angeles*, 8 E.P.D. [¶ 9444], 5049 [C.D. Cal. 1974]. The congressional intent to limit awards to prevailing parties requires

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another factor. For instance, the calculation of an hourly rate usually reflects the fees charged in a locality (factor three), and the experience, reputation and ability of the attorneys performing the services (factor seven).

> that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

Following this language in *Hensley*, GM asserts that plaintiffs' attorneys Boyle, Harte, Goodman and Goldman are not entitled to any fees or expenditures in connection with the *Skelton* claims dismissed by the Seventh Circuit in *Skelton v. General Motors Corp.*, 660 F.2d 311 (7th Cir. 1982), *cert. denied*, 456 U.S. 974, 102 S.Ct. 2238 (1983), and urges this court to disallow any fees for the time spent briefing the motions to dismiss before Judge Moran, the appeal to the Seventh Circuit, and the subsequent petition for certiorari.

Plaintiffs' counsel assert that the *Hensley* standards are inapplicable to fee awards under the common fund doctrine, which permits reimbursement for all fees expended in the creation of a common fund. This position exaggerates the distinctions between statutory and common fund fee awards. As stated earlier, the courts in this circuit apply the same criteria when determining awards for statutory fees and fees from a common fund. The common fund doctrine, like the statutory fee provisions, also instructs the court to analyze the fee petition to determine whether the plaintiffs "prevailed" on certain claims, and whether the time expended contributed to the ultimate favorable resolution of the case. *See e.g., Swanson v. American Consumer Industries*, 517 F.2d 555, 563 (7th Cir. 1975) (the fact that a plaintiff did not prevail on certain issues is entitled to weight in the determination of an appropriate fee award). *Kennedy v. Nicastro*, 546 F.Supp. 267 (N.D. Ill. 1982); *Zilker v. Klein*, 540 F.Supp. 1196, 1198-99 (N.D. Ill. 1982); *In re Penn Central Securities Litigation*, 416 F.Supp. 907, 917 (E.D. Pa. 1976), *rev'd on other grounds*, 560 F.2d 1138 (3d Cir. 1977). Accordingly, the court finds that the *Hensley* guidelines for assessing fees in statutory fee cases are

equally relevant to a determination of fees under the common fund doctrine.[13]

Regardless of the analysis employed, however, the court finds that exclusion of all the time expended on the *Skelton* claims would be improper. The Seventh Circuit recently discussed *Hensley*'s limitation of fees to those reasonably expended on "prevailing" claims in *Zabkowicz v. West Bend Co.*, 789 F.2d 540 (7th Cir. 1986). In *Zabkowicz*, the plaintiff filed a sexual harassment suit under Title VII which also contained pendent tort claims stemming from the alleged discriminatory conduct. The district court found that the defendants had violated Title VII, but it denied plaintiffs' request for attorneys' fees in its entirety because the hours were excessive and failed to distinguish between the time spent on the Title VII claim and the time spent on the state law claims. On appeal, the Seventh Circuit reversed, holding that the district court should consider the lawsuit as a whole, and take into account the interrelated nature of the various claims in the case when determining an appropriate fee award for a prevailing plaintiff. *Zabkowicz*, 789 F.2d at 551. The court instructed:

> Where several claims arise out of a common factual core or are based on related legal theories, separating 'out the legal services rendered with respect to these overlapping claims would be an exercise in futility.' In accordance with *Hensley*, we believe that prevailing plaintiffs may be entitled to compensation for time expended on such related claims.

Id. (citation omitted).

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[13] The guidelines for assessing statutory fees originated in the standards commonly used to assess the reasonableness of a petition seeking fees from a common fund. *See supra* note 9. *See also In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 583 n.19 (3d Cir. 1984); *Prandini v. National Tea*, 557 F.2d 1015 (3d Cir. 1977); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470-71 (2d Cir. 1974); *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 255-56 (N.D. Ill. 1979).

The *Zabkowicz* court explained that the next inquiry involves whether the plaintiff's unsuccessful claims are sufficiently related to the successful claims to justify an award of attorneys' fees. It held:

> *Hensley* provides no precise method for determining whether claims are related or unrelated. Nonetheless, a 'useful tool for making this determination is to focus on whether the claims seek relief for essentially the same course of conduct.' . . . From this perspective, 'an unsuccessful claim will be unrelated to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.'

Id. (citations omitted). In order to determine whether the claims were sufficiently related, the court examined each claim separately. It found that, "although these claims are based on distinct legal theories, they undeniably involve a common core of facts. The tort claims sought to remedy the same course of conduct that gave rise to the Title VII claims." *Id.* Accordingly, the Seventh Circuit remanded the question of attorneys' fees to the district court, finding that the plaintiff may be entitled to the entire amount of her fee claim, depending upon the "significance of the overall relief obtained . . . in relation to the hours reasonably expended on the litigation.' " *Id.* (citing *Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940).

Following *Zabkowicz*, the court finds that wholesale exclusion of the time expended on the Seventh Circuit appeal and petition for certiorari is not warranted in this case. *See Lenard v. Argento*, No. 85-1786, slip op. at 4 (7th Cir. January 6, 1987) (rejecting defendant's "mechanical claim-chopping approach" to attorneys' fees). These claims alleged the same improper conduct and

sought the same remedy ultimately provided in the settlement agreement. In *Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 576 (7th Cir. 1983), the court held:

> If, . . . the plaintiff has asserted unsuccessful claims related to the successful claims by a 'common core of facts' or that are based on 'related legal theories,' . . . time spent on these related but unsuccessful claims should not automatically be excluded in arriving at a reasonable attorney's fees award. Instead, the court [should] focus on the overall results obtained to determine whether it should compensate the plaintiff for the hours spent on the related but unsuccessful claims. Generally, if the results obtained are excellent, the '[plaintiff's] attorney should recover a fully compensatory fee,' which will '[n]ormally . . . encompass all hours reasonably expended on the litigation. . . .' If the plaintiff has achieved only partial success, however, compensating the plaintiff for all hours expended on the litigation may be excessive. In such a situation, the court may adjust the award either by identifying specific hours that should be eliminated or by simply reducing the overall award to reflect the plaintiff's limited success.

citing *Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940. Thus, although a reduction may be appropriate to reflect the reasonableness of this time in light of the relief ultimately obtained,[14] the court rejects GM's argument that all of this time must be excluded from consideration when determining the proper fee award. *See also Lenard v. Argento*, No. 85-1786, slip op. at 4 (7th Cir. January 6, 1987) (where a lawyer "presents a congeries of theories each factually and legally plausible, he is not penalized because some, or even all but one, are rejected, provided that the one or ones that succeed give him all that he

[14] The court has made some adjustments to reflect the relationship between these hours and the settlement agreement.

reasonably could have asked for."); *Ramos v. Lamm*, 713 F.2d 546, 556 (10th Cir. 1983) (reduction for lost claims may not be necessary if plaintiffs' claims involve a common core of facts or are based on related legal theories); *Monroe v. United Air Lines, Inc.*, 565 F.Supp. 274, 285-86 (N.D. Ill. 1983) (allowing fees for an unsuccessful preliminary injunction where the plaintiffs ultimately prevailed in the litigation).

GM also seeks a reduction in hours to reflect the fact that plaintiffs relinquished some claims during the course of the settlement agreement. The foregoing discussion applies with equal or greater force to these so-called 'abandoned" claims. Basically, to oversimplify, all of these claims involve different theories to redress the same wrong—GM's placement of THM 200 transmissions into automobiles requiring THM 350 transmissions. In *Zabkowicz*, the Seventh Circuit recognized that, when a plaintiff voluntarily dismisses a claim as part of a settlement vindicating his rights, a fee award based on all the plaintiffs' claims may be appropriate. *Zabkowicz*, 789 F.2d at 552. In the present case, the court never ruled on the remainder of the plaintiffs' petitions for class certification, and it denied GM's motions to dismiss. Plaintiffs' counsel should not be penalized just because they relinquished some claims in order to reach a comprehensive settlement agreement with GM. *See Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 567 (7th Cir. 1983). Accordingly, the court rejects GM's assertion that the fee award should be decreased to reflect the plaintiffs' dismissal of related claims in the course of the settlement negotiations.

As a corollary to the arguments regarding the "lost" and "abandoned" claims, GM argues that the fee award should be reduced significantly to reflect the disparity between the relief sought and the recovery obtained in the settlement agreement. Although the plaintiffs did not obtain relief on behalf of all the classes originally desig-

nated in the complaints, this does not diminish the very significant recovery obtained by class counsel in their pursuit of this litigation. As with any claim involving an area of uncharted law, plaintiffs were required to develop alternate theories for GM's liability. This involved formulating innovative arguments to convince the court of the viability of pursuing these claims as a class action, and presenting the court with sufficient authority to defeat GM's vigorous and able efforts to dismiss the litigation. Counsel's very substantial efforts in this regard have not gone unrewarded. Through their efforts, millions of consumers across the country will be able to obtain reimbursement for costs incurred in attempts to repair their THM 200 transmissions.

GM seeks to diminish the nature of plaintiffs' undertaking and the level of their success. The record in this case and the size of the settlement fund illustrate the substantial benefits that plaintiffs' counsel have conferred on the class. They achieved class certification in a nationwide Magnuson-Moss warranty action, and successfully defeated GM's repeated efforts to decertify the class and dismiss the case. Although they cannot claim direct credit for the settlement of the FTC action, it is a fair inference that the pendency of these cases had some effect on the willingness of GM to enter the consent decree with the FTC. This agreement provided relief to putative members of the class through the creation of a Mediation and Arbitration panel.

Finally, the terms of the June 16, 1986 settlement agreement between GM and the plaintiffs clearly demonstrate the significant benefits that the class counsel achieved for many members of the class. In *Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 567 (7th Cir. 1983), the court recognized that

> Although some settlement agreements may be structured so that they dispose of the original claims in a way that allows the court to decide whether a

> particular claim has been ultimately successful or unsuccessful, this will not always be the case. Indeed, many settlements will be informally structured with an eye toward the achievement of overall objectives, rather than the disposition of discrete claims. With these more general settlements, the analysis in *Hensley* regarding successful and unsuccessful claims may be unworkable, although the central teaching of *Hensley* will still apply. That teaching is that in every case the court must explicitly consider whether the fee is a reasonable one in light of the level of the plaintiff's success.

This case clearly presents a situation where the settlement was "structured with an eye toward the achievement of overall objectives." Following the Seventh Circuit's instruction in *Illinois Welfare Rights*, this court will focus on the reasonableness of the fees, and will not reduce the award merely because the recovery obtained is less than that requested at the outset of the litigation.

2. *Time Spent on Class Certification Motions*

GM objects to the time expended on the motions for class certification, which, by GM's calculation, surpasses 3200 billable hours. According to GM, this figure is comprised of excessive "read and review time" and "conference" time between the various sets of plaintiffs' counsel. Although this 3200 figure appears excessive when considered in the abstract, the court finds that the procedural history of this case and the complex nature of this suit justifies the great majority of the hours claimed on the class certification motions (the court has made some reduction in hours for excessive review and conference time and other time of little benefit to the result achieved). By operation of the local rules of court, five district court judges presided over this litigation be-

tween 1978 and 1982.[15] The necessary process of familiarization which accompanied each transfer to a new judge required some duplication of effort beyond the control of the class counsel. Each transfer necessitated some new briefing and updating of the class certification motions. The class counsel should not be penalized for the so-called "duplicative" hours spent familiarizing transfer judges with the background of a case and its pending motions. The complicated nature of this lawsuit, the extraordinary size of the class, and the uncertainty and continuing evolution of the law in this area also demanded a significant expenditure of time. Most of the time spent briefing and updating these motions was necessary and well-invested, and ultimately persuaded the court to certify at least one class of plaintiffs and to deny GM's motion to dismiss. Accordingly, the court finds that an overall general reduction in fees for excessive briefing is not warranted in this case.[16]

3. *Staffing at Court Appearances*

GM also accuses plaintiffs' counsel of overstaffing at court appearances by providing several lawyers at some hearings where one or two lawyers would suffice. GM refers to several hearings to illustrate this objection. In general, the courts are reluctant to allow compensation for an abundance of attorneys appearing on a routine matter. *See, e.g., In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 579 (3d Cir. 1984); *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1296, 1307

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[15] The docket reflects the following chronology: Judge McGarr (1977-1979) (part of *Engines*); Judge Crowley (1979-1980); Judge Moran (1980-1982); Judge Getzendanner (May 1982-September 1982); Judge Nordberg (September 1982 to present).

[16] The court has discussed individual instances of excessive billing in its section addressing the individual petitions. Even if some excesses did occur, they were not so rampant as to justify GM's request for an across-the-board reduction in fees.

(E.D. N.Y. 1985); *In re Continental Illinois Securities Litigation*, 572 F. Supp. 931, 933 (N.D. Ill. 1983); *United States v. Allen*, 578 F. Supp. 468, 483 (W.D. Wis. 1983). Where an attorney appears at a hearing as a "spectator" rather than a participant, he should not be compensated for his time in court because his presence does not materially advance the progress of the litigation. *See In re Fine Paper*, 751 F.2d at 579. If the circumstances of the hearing require the presence of more than one attorney, however, then the court should allow attorneys' fees to all necessary participants in the hearing.

Although this court has presided over these cases only since May, 1982, it disagrees with GM's characterization of plaintiffs' alleged "overstaffing" at court appearances. These cases were not consolidated until late 1981. Prior to the consolidation, the counsel for *Skelton* and *Newton* had to appear separately because they had separate clients and were advancing different theories of recovery. Each transfer of the case necessitates an appearance by group counsel before the new transferee judge to familiarize the judge with the attorneys and the issues in the case. The number of attorneys which have appeared before this court between 1982 and 1986 has never seemed excessive to this court. For the most part, the attorneys who have appeared in the last four years actively participated in the hearings and contributed to the advancement of the litigation. (The defendant has routinely been represented by two lawyers at court appearances.) This court has not observed excessive attendance by counsel which would justify a decrease in the hours allowed. Accordingly, the court finds that the requested reduction for overstaffed court appearances is not warranted in this case.

4. *Travel Time*

GM also objects to class counsel billing full rates for time spent travelling to other cities in pursuit of this litigation. With the exception of the Zwerling and Good-

kind petitions, the fee petitions do not clearly delineate the hours that they seek to charge the fund for time spent on a plane or some other means of transportation. When questioned about the amount of in-flight time charged, plaintiffs' counsel admitted that they charged for time spent in transit, but only if that time was actually spent working on the case. However, they did indicate that they were usually working on the case while in transit. It is this court's experience that cramped working conditions, limited access to materials, frequent interruptions, and inevitable distractions render travel time much less productive than other time spent on a case. Accordingly, the court has reduced the hours claimed for travel to and from a given destination by 50%. *See Orshan v. Macchiarola*, 629 F. Supp. 1014, 1020 n.3 (E.D. N.Y. 1986); *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1296, 1349 (E.D. N.Y. 1985); *Society for Goodwill to Retarded Children v. Cuomo*, 594 F. Supp. 994, 998 (E.D. N.Y. 1983).[17]

5. *Attorney Fee Rate*

When attorneys undertake to represent a class, their fees are usually contingent on the success of the class action, and they may not be paid for their efforts until several years after the action is commenced. This results

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[17] Some courts in this circuit have indicated that full compensation for travel may be appropriate. *See Henry v. Webermeier*, 738 F.2d 188, 194 (7th Cir. 1984); *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 454-55 (N.D. Ind. 1981), *aff'd in relevant part*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2428 (1983). The court acknowledges that a complete reduction in travel time is too harsh; however, it finds that travel time should be reduced to reflect the fact that, because of travel demands and inevitable distractions, these hours are not as beneficial or productive as time spent at the office or in court. *Society for Goodwill to Retarded Children v. Cuomo*, 574 F. Supp. 994, 998 (E.D. N.Y. 1983); *Ryan v. Raytheon Data Systems Co.*, 601 F. Supp. 243, 256 (D. Mass. 1985). These reductions are set out in more detail in the discussion of the individual petitions.

in the loss of both the use and some of the value of money, thus prompting counsel to seek an adjustment for interest and inflation. In order to account for the effects of this delay in payment, the courts in this circuit generally allow an attorney to submit his entire fee request calculated in accordance with his current rate, which provides a rough approximation for the effects of delay. *See, e.g., Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 764 (7th Cir. 1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2428 (1983); *Gautreaux v. Pierce*, 690 F.2d 601, 612 (7th Cir. 1982), *cert. denied*, 461 U.S. 961, 103 S.Ct. 2438 (1983); *Coleman v. Fierson*, 607 F. Supp. 1578, 1581 (N.D. Ill. 1985); *Phemister v. Harcourt Brace Jovanovich, Inc.*, 1984-2 Trade Cases ¶ 66,234 at ¶ 66,996 (N.D. Ill. 1984).[18] *See also Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983); *In re "Agent*

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[18] In *Ohio-Scaly Mattress Manufacturing Co. v. Scaly, Inc.*, 776 F.2d 646, 663 (7th Cir. 1985), the Seventh Circuit acknowledged that a district court could compensate for the delay in payment by using current rates, but it was not required to do so. *See also Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 764 n.16 (7th Cir. 1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2328 (1983). The *Ohio-Scaly* litigation spanned over fifteen years, and the trial court declined to employ current rates because it determined that current rates would produce a windfall to the plaintiff's attorneys. The Seventh Circuit affirmed the refusal to use current rates, noting that "[w]hen a case lingers on for a long time, . . . using current hourly rates may produce a windfall for the plaintiff since changes in hourly rates reflect not only inflation but also an attorney's increased experience and skill." *Id.* at 663. GM relies on this language to argue that the use of current rates will result in a windfall to class counsel in the present case. This court disagrees. This litigation spanned a period of seven years, which witnessed periods of very high inflation. Calculating all fees at or near current rates adequately offsets the loss generated by the delay in payment in this case. *See Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 457-58 (N.D. Ind. 1981), *aff'd in relevant part*, 670 F.2d 764 (7th Cir. 1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2428 (1983) (affirming calculation of fees at current rates for litigation spanning eight year period).

Orange" Product Liability Litigation, 611 F. Supp. 1296, 1310 (E.D. N.Y. 1985).

In the present case, seven of the nine petitioners have requested fees at their current rates. The Sachnoff, Weaver firm and the firm of Charles A. Boyle seek fees at their historic rates, plus interest calculated at the prime rate for a given time period. Calculation of fees pursuant to this method produces significantly higher fees than those obtained by using the firms' current rates.[19] Following the procedure generally accepted in this Circuit, the court finds that in this case the calculation of reasonable fees on a current basis properly compensates all petitioning attorneys for the delay in payment in this case.

In calculating on a current basis the reasonable fee rate to be allowed each attorney in this case, the court took into account all relevant factors, including the benefit to the class, the skill and the difficulty of the legal work completed, time reasonably required and duplication of efforts, current fee rates charged by the lawyer for similar services, current fee rates customarily charged

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[19] Calculating fees at historical rates plus a prime rate enhancement, Boyle's petition totals $742,667.86. If calculated at current rates, his total requested fees are less than half that figure. Similarly, calculating Sachnoff's hours at a historical rate with a prime rate enhancer produces fees much greater than the figure obtained by calculating fees in accordance with the firm's current rates.

In a supplemental submission, Boyle encourages this court to follow the decision of Judge Roszkowski in *Airline Stewards and Stewardesses Assn., et al. v. Trans World Airlines, Inc., et al.*, 70 C 2071 (74 C 2063) (N.D. Ill. September 17, 1986). The court's review of this case reveals that this decision does not support the prime rate interest enhancer requested by Boyle and Sachnoff. In *Airline Stewards*, Judge Roszkowski actually rejected an interest rate enhancement determined according to the prime rate. He found that the attorneys were entitled to an interest enhancement of 7½ percent, the interest rate on a long-term treasury rate purchased at the start of the litigation. *Id.* at 4.

in the locality for similar legal services, the amount involved and results obtained, the experience, reputation, and legal ability of each lawyer, the difficulties in dealing with such a large class of claimants, and the contingency of the fee. The court is mindful of the chilling effect on future consumer class actions that might result from failure to adequately compensate counsel for their efforts in this litigation.

The Individual Petitioners

Charles A. Boyle & Associates Ltd.

Boyle requests compensation for 1764.80 hours at $200/hr. GM has four basic objections to Boyle's petition for fees. First, it argues that the time spent on the losing *Skelton* appeal should be eliminated in its entirety. As this court explained above, however, plaintiffs may still seek compensation for the time spent on the *Skelton* claims because they are related to the claims on which plaintiffs ultimately prevailed. However, the court finds that, since the pursuit of these claims did not fully contribute to the creation of the settlement fund, these hours should be reduced by 33%. The court's review of Boyle's petition reveals that he expended approximately 475 hours pursuing the *Skelton* claims in the district court, the appeal and the petition for certiorari. The court will permit compensation for 67% of those hours, or 318.25.[20]

Second, GM accuses Boyle of excessive "read and review" time. Although every class action staffed by several groups of plaintiffs' lawyers generates some necessary "read and review" time, it is this court's role to ensure that the attorneys do not engage in excessive

[20] The court has disallowed the costs of printing the briefs on appeal.

reviews of each others' work. *See In re Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir. 1984); *Lackey v. Bowling*, 476 F. Supp. 1111, 1118 (N.D. Ill. 1979); *Manual for Complex Litigation*, § 24.22 at 189. The court has reviewed all of Boyle's entries, and finds that, given his role in this litigation, his review time is, for the most part, sufficiently well-documented and within reason.

GM's third objection is closely related to the second one. GM accuses Boyle of engaging in too much "conference" time with the other plaintiffs' attorneys. Boyle's fee petition contains references to a number of conferences, phone calls and meetings with the other members of class counsel. The court finds that Boyle's conference time, like his "review" time, is not greatly excessive in light of the history and demands posed by this litigation (*i.e.*, consolidation of two separate actions, transfer to several judges, and the protracted settlement negotiations). However, the court finds that the timesheets do reflect some duplication of effort and extensive reviewing and conferring with limited benefit to the class. Therefore, the court has reduced the requested hours by 10% to reflect this.

Finally, GM asserts that Boyle charged premium rates for tasks which could be performed by paralegals. For the most part, these tasks included review of the case file and communication with class members. Generally, a senior attorney is not entitled to premium rates for services which could be performed by a paralegal or less experienced attorney. *See Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 767 n. 16 (7th Cir. 1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2428 (1983); *Daggett v. Kimmelman*, 617 F.Supp. 1269, 1282 (D. N.J. 1985). After reviewing Boyle's petition, the court finds that some of the hours claimed for senior attorney time should have been delegated to paralegals. The court has reduced Boyle's time accordingly. *See Daggett*, 617 F.Supp. at 1282 ("It was the fee applicant's prerogative to staff every task involved

in this case with partners, but that does not automatically entitle the law firm to recover 'partner rates' for everything").

The court notes that Boyle also seeks to charge fees for the time spent talking to the press.[21] In the court's view, this time should be compensated at 33% of the hourly rate because it involves minimum benefit to the class and does not involve a task which justifies full compensation for senior attorney time. *Cf. Society for Goodwill to Retarded Children v. Cuomo*, 574 F.Supp. 994, 998-99 (E.D.N.Y. 1983) (disallowing all time spent with media).

GM also objects to Boyle's list of expenses, which GM characterizes as overhead charges subsumed in Boyle's hourly rate. *See Ramos v. Lamm*, 713 F.2d 546, 557, 559 (10th Cir. 1983); *Roe v. City of Chicago*, 586 F.Supp. 513, 516 (N.D. Ill. 1984). If a case involves unusual expenditures over and above the expenses necessary for the operation of a law firm, then these expenses are properly chargeable to the fund. *Ramos*, 713 F.2d at 559; *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1322 (E.D. N.Y. 1985). The criticized charges in Boyle's petition include automated answering machine services, storage space and office supplies. Given the magnitude of the litigation and the necessity of establishing adequate facilities and support systems to respond to class inquiries and store class information, these expenses cannot be characterized as mere overhead expenses which should be included in Boyle's hourly rate.[22]

Corinblit & Seltzer

The two principals of this firm seek compensation for a total of 100 hours that the firm expended on this litigation. Jack Corinblit logged 41 hours at a claimed rate of

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[21] By the court's calculation, this amounts to approximately 6 hours, 2 of which will be allowed.

[22] However, the court has disallowed a public relations expense of $693.75.

$250/hr., and Marc Seltzer logged 59 hours at a claimed rate of $225/hr. These attorneys never appeared before the court on the case. From the timesheets, it appears that their primary involvement in this case was their participation in a deposition in December of 1980.[23]

GM argues that the requested fees should be reduced because nearly all of their time was spent "conferring and reviewing" the work of other attorneys. After analyzing these timesheets, the court concludes that their conference and review time is excessive, and has been reduced accordingly. Corinblit's timesheets reveal that over 23 of his 41 requested hours were spent in conferences with other class counsel. Over 16.5 hours of this conference time included Marc Seltzer, his partner. Seltzer logged 34 hours of conference time, and 13.25 hours of these conferences included Corinblit. The firm has not provided the court with any justification for its double-staffing at these conferences. In *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1325 (D. N.J. 1985), the court disallowed all time spent in conferences between partners and associates of the same firm. Although a wholesale elimination of conference time between members of the Corinblit firm is not warranted under the facts of this case, the court finds that a reduction in these hours is appropriate. In order to offset what might otherwise constitute double-billing, the court has reduced Corinblit's request by 8.25 hours and Seltzer's request by 6.5 hours. In addition, because the court finds that there has been little benefit resulting from excessive reviewing and conferring with other counsel, the court has reduced the requested hours by 20%.

Abraham N. Goldman & Associates, Ltd.

GM objects to Goldman's request for compensation in connection with the losing *Skelton* appeal. In accordance with the procedure employed in the Boyle petition, this

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[23] The court has calculated Corinblit's fees at a rate of $200/hr. and Seltzer's fees at a rate of $175/hr.

court has determined Goldman is entitled to fees for 66% of the time expended on the *Skelton* appeal, and his time spent travelling to Washington, D.C. has been reduced 50%.[24]

GM also aserts that Goldman's hourly rates are excessive in light of his experience. Mr. Goldman started practicing shortly before these cases were commenced. The court has taken his experience into account when setting the appropriate hourly rate.[25]

Finally, GM objects to Goldman's request for premium compensation for so-called "clerical tasks." The statutory prerequisites of Magnuson-Moss class actions necessitated many communications with class members. Goldman's responsibilities in this litigation involved substantial communication and interaction with individual members of the plaintiff class. His staff included several paralegals who were given significant responsibilities in organizing and maintaining the records of the plaintiff class members. His ability to delegate is reflected in the fact that he claims approximately 2,000 attorney hours and over 5,500 paralegal/data entry hours. *See Phemister v. Harcourt-Brace Jovanovich, Inc.*, 1984-2 Trade Cases ¶ 66,234 at 66,996 (N.D. Ill. 1984). However, the nature of Mr. Goldman's involvement in this case was primarily administrative. The court has reduced his time by 10% to reflect the fact that the tasks he undertook toward the end of the litigation were primarily administrative in nature, as well as to adjust for the extensive time spent on conferences, reading and reviewing, with limited benefit to the substantive legal issues in the case.

Goodkind, Weschler, Labaton & Rudoff

The Goodkind, Weschler firm filed the *Morgan* and *Attard* actions in New York, which were transferred to

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[24] The court has reduced his requested hours by four hours to reflect time spent traveling.

[25] The court has calculated Mr. Goldman's fees at a rate of $150/hr.

this court in conjunction with the settlement. These actions were informally stayed in 1983 pending this court's ruling on the class certification motions. Before this stay, these attorneys successfully defeated GM's motion to dismiss, and commenced discovery in these actions. The firm seeks a total of $378,207.07 in fees for over 1600 hours of work.[26] GM's major objection to this firm's fee petition is that it is too vague to permit any meaningful review.

The firm's timesheets are on a computer printout, and are admittedly brief. The firm has supplemented its petition in its reply brief, however, and the entries are not so cursory that they preclude this court from determining their accuracy. *See Berberena v. Coler*, 753 F.2d 629, 634 (7th Cir. 1985) (entries are sufficient if they identify the substance of the work performed). The firm delegated a great deal of the responsibility for the prosecution of the actions to lower-level associates and paralegals. However, there was an extensive amount of time spent on conferences, reading and review with some duplication. Therefore, the court has reduced the requested legal hours by 10% and paralegal time by 5%.

In accordance with the court's guidelines for travel time set forth above, the court has reduced the time claimed for work while travelling to and from Chicago by 50%.[27]

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[26] The court has calculated the firm's fees at the following hourly rates:

Attorney	Rate/Hr.
S. Weschler	$220
E. Labaton	$220
W. Kass	$200
R. Schacter	$160
L. Sucharow	$150
J. Plasse	$120
M. Isaacs	$ 70
E. Perry	$ 70

In determining these hourly rates, the court considered the fact that most of these hours were expended between 1980 and 1983.

[27] The court has disallowed ten hours of travel time.

Francis E. Goodman, P.C.

Goodman's fee petition seeks compensation for 451.70 hours of time at a rate of $150/hr. GM asserts that this petition should be substantially reduced or denied in its entirety because Goodman contributed very little in the case, and he spent most of his time reviewing the work of other attorneys. Goodman's petition is replete with entries seeking compensation for his review time. Although this court was not able to observe Mr. Goodman's role in the early stages of the litigation, he has not been a primary player since these cases were transferred to this court in 1982. Given his limited role since that time, the court finds that he is not entitled to compensation for all of his time spent in conferring and reviewing the work of the other attorneys more heavily involved in the litigation. The court disagrees with GM's argument that all this review time must be disallowed, however. The court has determined that a 25% reduction in the hours claimed is appropriate to reflect the limited benefit from Goodman's hours expended in this litigation. *See In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 579 (3d Cir. 1984); *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1325 (D. N.J. 1985); *United States v. Allen*, 578 F.Supp. 468, 483 (W.D. Wisc. 1983).

GM also requests a reduction in Goodman's hours to reflect time spent on the losing *Skelton* claims. Consistent with the procedure adopted for these claims in the Boyle and Goldman petitions, the court has determined that Goodman's time spent on these claims should be reduced by 33%.

William J. Harte, Ltd.

Harte requests attorneys' fees and costs totalling $438,456.94. GM argues that his request should be diminished to reflect the time spent on the losing *Skelton* appeal. The court finds that, for the reasons set forth on pages 10-13, *supra*, a complete elimination of this time is unwarranted.[28] Although the court will allow compensa-

[28] The court has reduced costs associated with the *Skelton* appeal and petition for certiorari.

tion for time spent on these claims, the attorney and paralegal time will be reduced 33% to reflect its contribution to the ultimate settlement of this action.

GM also accuses Harte of poor record-keeping and vague entries. Although several entries are somewhat cursory, this court is sufficiently familiar with Harte's important role in the litigation to permit these entries without a request for clarification. *Berberena v. Coler*, 753 F.2d 629, 634 (7th Cir. 1985). However, because of the extensive amount of time spent on conferences, reading, and review with limited benefit to substantive legal presentation, the court has reduced the requested hours of Mr. Harte by 10% and for similar reasons the paralegal time by 5%.

Law Offices of Beverly C. Moore, Jr.

Moore's petition requests compensation for nearly 4,000 hours of attorney time and over 1,400 hours of paralegal time. GM raises several objections to Moore's request for fees and expenses. First, GM disputes Moore's requested hourly rate of $175/hour, and argues that Moore has insufficient experience to justify such a high fee. Taking into account all the relevant factors previously referred to, the court finds that Moore is entitled to compensation at a rate of $140/hr. Although Moore provided research for the class certification briefs, and demonstrated some expertise in addressing problems posed by this class action, his rate should reflect, among other things, the fact that he does not have a great deal of litigation experience.

Second, GM challenges Moore's request for fees in connection with the *Fritz* action. Moore filed this action in the federal district court for the District of Columbia in 1984, shortly before this court issued its interim ruling. After the interim ruling, Moore secured an order transferring the case to this court. The court agrees with GM that the filing of this case did nothing to advance

the progress of this litigation or achieve the ultimate settlement of the case. In *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1296, 1307 (E.D. N.Y. 1985), the court noted:

> One instance of duplicative work arising from the nature of a class action, . . . concerns the filing of individual lawsuits by class members. Attorneys who file individual suits on the same claims involved in the class action do not substantially aid the prosecution of the class action. These collateral cases ultimately are dismissed as duplicative. An award of fees for such 'me too' litigation would encourage fruitless and unnecessary work.

Moore's filing of the *Fritz* action in Washington, D.C. is a perfect example of "me too" filing of duplicative litigation criticized in *Agent Orange*. It is significant that none of the other class counsel joined Moore in the filing of this action, nor do they seek any fees in connection with it. The court finds that Moore is not entitled to any fees or expenses in connection with the *Fritz* case because this action involved unnecessary expenditures of time and money which bear no relation to the favorable settlement in this case or the creation of the settlement fund.[29]

Moore did not join the other plaintiffs' counsel in the settlement agreement. In fact, he strongly resisted the settlement which created the common fund. GM argues that Moore should not be compensated for the time spent resisting the settlement, because these efforts hindered the settlement negotiations instead of helping them. The court agrees with GM that Moore is not entitled to full compensation for the time spent objecting to the settlement. The fund does not have to pay attorneys' fees for the time spent *objecting* to its creation. Although Moore's

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[29] By the court's calculation, Moore spent 155.8 hours of attorney time and 73.3 hours of paralegal time on the Fritz action.

time spent on the settlement is not fully compensable, the courts finds that he is entitled to some remuneration for his participation in the settlement processes. An objector to a settlement process often sharpens the issues and may achieve additional benefits for the class. Although he opposed the settlement, Moore's participation in the settlement negotiations cannot be dismissed in its entirety. Therefore, the court has determined that he is entitled to 50% of his time in the settlement stake of the case.

Moore took one trip to Reading, Pennsylvania and approximately seventeen trips to Chicago. Consistent with the guidelines set forth *supra* on page 18, the court has reduced his work travel time by 50%.[30] The court has also reduced Moore's time spent talking with the media to 33% *See Society for Goodwill to Retarded Children*, 574 F. Supp. 994, 998-99 (E.D. N.Y. 1983).[31] Because of the very extensive amount of time spent on conferences, reading and review, and especially preliminary matters long before litigation commenced, with the very limited benefit to the success of the case, the court has reduced the requested hours of Mr. Moore by 40% and paralegal time by 11%.

Moore requests expenses totalling $43,206.98. GM argues that some of these expenses are not compensable because they should be considered part of overhead. *See In re Fine Paper Antitrust Litigation*, *supra*. In par-

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[30] Moore seeeks compensation for 17 trips to Chicago.

[31] The court rejects Moore's request for compensation for the following entries unrelated to the present class action:

2/19/85	T/C w/Ben Todd re *Pope v. GM*	4.7
12/03/82	Prepare Findex of Briefs	11.0
10/25/79	T/C w/W.Va. attys in Ford Piston scuffing case	1.0
8/12/79	Watched Report on NBC program Prime Time Sunday	.3
		17.0

ticular, GM argues that the charges for overtime word processing should have been subsumed in Moore's hourly rate. The court disagrees. Given Moore's role in the briefwriting process, the resort to overtime staff to complete the pleadings in this case was sufficiently necessary and predictable. The court does not view these charges as unreasonable.[32]

Sachnoff, Weaver & Rubenstein, Ltd.[33]

GM's major objection to Sachnoff's entries revolves around the firm's request for computation of fees at historic rates with an upward adjustment to reflect interest calculated at the prime rate. The court's has decided that it is in the interests of justice to award all fees on a current basis, regardless of when the work was performed.[34]

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[32] However, most of Moore's miscellaneous expenses have been eliminated because they bear no apparent relationship to this action (ex: bank service charges, post cards, tape recorder, magazine).

[33] The Sachnoff firm is the only firm that requests reimbursement for its time spent preparing a fee petition. Some of this time was spent preparing the firm's own petition and some was expended preparing the joint briefs filed by the class counsel in this case. In general, the courts have agreed that this time is not compensable in common fund cases because it is clearly not time spent creating, preserving or enlarging the fund. *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 579 (3d Cir. 1984); *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1102 (2d Cir. 1977); *Lindy Brothers, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 111 (3d Cir. 1976); *Bailey v. Heckler*, 621 F. Supp. 521, 524 (W.D. Pa. 1985); *Hew Corp. v. Tandy Corp.*, 480 F. Supp. 758, 764 n.10 (D. Mass. 1979); *Population Services International v. Carey*, 476 F. Supp. 4, 7 n.3 (S.D. N.Y. 1979); *Spiekerman v. Whittaker Corp.*, 598 F. Supp. 1, 8 (E.D. N.Y. 1978). The court will follow this rule and disallow the time spent preparing the fee petition for the Sachnoff firm. However, the court will allow $15,000 for the time spent drafting the joint brief.

[34] The court has awarded the Sachnoff firm fees at the following rates:

GM also accuses the Sachnoff firm of overbilling and vague time keeping. The overbilling charge stems from GM's assertion that the hours spent on "abanonded claims" and the time spent briefing the class certification motions must be reduced to reflect the limited nature of the relief obtained. These objections have been addressed in earlier portions of the opinion. Suffice it to say that this firm has been at the forefront of this litigation and has played a major role in achieving the creation of the settlement fund. The Sachnoff firm has fulfilled a lead role and has submitted high quality work throughout this litigation. Because of the extensive amount of time spent on conferences (including intra-firm conferences), reading and review, with a limited benefit for same, the court has reduced the requested hours by 5% and paralegal time by 5%.[35]

Zwerling, Schacter & Zwerling

Zwerling, Schacter is a New York-based firm which was formed in January of 1985, after its partners left the Goodkind, Weschler firm. The firm has acted as co-counsel with Goodkind in the *Morgan* and *Attard* actions from January of 1985 to the present. It requests compensation for 90.30 hours of attorney and paralegal time. The court has reviewed the firm's timesheets, and

Attorney	Rate/Hr.
L. Sachnoff	$240
B. Rosen	$145
M. Tenenbaum	$125
M. Denlow	$110
C. Watkins	$135
J. Schumacher	$130
J. Feldman	$ 80
D. Morris	$ 70
M. Kaufman	$ 90

[35] The court has reduced the award by 17 hours (10 for BAR, 7 for JAS) for travel time and 5 hours spent speaking to Mr. Moore about the *Fritz* action.

has reduced travel time by 50% for the reasons previously indicated.[36] Because of the very extensive time spent on conferences and review, again the court has reduced the requested hours by 20%.

Request for a Multiplier

Having calculated the proper lodestar amount for plaintiffs' attorneys, the court now turns to plaintiffs' request for an upward adjustment of .75 to be added to the lodestar. The class counsel argues that this multiplier of 1.75 is necessary to compensate them for the contingent nature of the lawsuit and the significant risks undertaken by them in this case. General Motors disputes the propriety of a multiplier on two grounds. First, it asserts that multipliers are never available under the statutory fee provision in the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(2). Second, it maintains that, even if a multiplier were available, the facts of this case do not warrant any upward adjustment of the basic lodestar amount.

These actions were commenced and prosecuted under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* A significant portion of the class counsels' time was expended investigating the individual claims to ensure that the Act's 100-plaintiff requirement [*See* 15 U.S.C. § 2310(d)(3)(c)] was fulfilled (*See* Joint Memorandum in Support of Class Counsels' Fee Petitions at 6, 12 n.1, 14 n.2). Plaintiffs sought, and ultimately obtained, class certification under the Magnuson-Moss Act. *See* Interim Order, *Skelton v. General Motors Corp.*, No. 79 C 1243 (N.D. Ill. December 20, 1984). Under these circumstances, even if the fee award is based on the common fund doctrine, any limitation contained in the Magnuson-Moss Warranty Act is a relevant consideration in determining whether to award a "risk" multiplier in this

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[36] The court reduced Mr. Schachter's hours by 4 to reflect time spent traveling to and from Chicago.

case. The structure of the settlement agreement should not divert the court from the Congressional intent underlying the passage of this Act.

Magnuson-Moss permits a court to award a successful plaintiff

> a sum equal to the aggregate amount of costs and expenses (including attorneys' fees *based on actual time expended*) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action. . . .

15 U.S.C. § 2310(d)(2) (emphasis supplied). GM argues that the language underscored above precludes this court from awarding a multiplier in a Magnuson-Moss case. Unlike most fee-shifting statutes, which permits awards of "reasonable" attorneys' fees, this Act appears to place a ceiling on the fees that a court may award a successful plaintiff. The plain language of the statute would seem to preclude any upward multiplier adjustment of the attorneys' fees awarded to a successful plaintiff. In *Ventura v. Ford Motor Co.*, 173 N.J. Super. 501, 414 A.2d 611, 612 (1980), *aff'd*, 180 N.J. Super. 45, 433 A.2d 801 (1981), the court denied a request for a multiplier of four, concluding that, "[a]n attorneys' fee allowance under the Magnuson-Moss Warranty Act is limited to 'actual time expended' but may exceed actual billings to a prevailing party if 'reasonably incurred.'" The court agrees with GM and the *Ventura* court that Section 2310(d)(2) evinces a Congressional intent to limit the fee award to the time actually expended in pursuit of a plaintiff's claim. Accordingly, the court concludes that a plaintiff in a Magnuson-Moss case is not entitled to an upward multiplier adjustment of the fees awarded.

However, even if § 2310(d)(2) does not prohibit a fee award which includes a multiplier, the court finds that the background of this litigation does not justify an in-

crease in the lodestar figures set forth in this opinion. This lawsuit was settled at a relatively early stage of the litigation. In view of the fee rates and hours allowed, this case does not present the exceptional circumstances, the exceptional kind of risk, or the exceptional success that warrants the use of a multiplier.

In the past, courts in both common fund and statutory fee cases have permitted upward adjustments of the lodestar figure to compensate plaintiffs' counsel for the delay in payment, the contingent nature of the lawsuit, superior representation, the risk of litigation and the exceptional quality of the results obtained. *See, e.g., International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1273-74 (8th Cir.), *cert. denied*, 449 U.S. 1063, 101 S.Ct. 787 (1980); *Kamberos v. GTE Automatic Electric, Inc.*, 603 F.2d 598, 604 (7th Cir. 1979), *cert. denied*, 454 U.S. 1060, 102 S.Ct. 612 (1981); *Northcross v. Board of Education*, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999 (1980); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973); *Phemister v. Harcourt-Brace Jovanovich, Inc.*, 1984-2 Trade Cases ¶ 66,234 at 66,997 (N.D. Ill. 1984). In *Hensley*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940 (1983), the Supreme Court implicitly affirmed this practice holding that

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.

Hensley, 46 U.S. 424, 435, 103 S.Ct. 1933, 1940.

In the past few years, however, the Supreme Court and the appellate courts of this circuit have begun to

question the propriety of awarding a multiplier to the basic lodestar figure. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S.Ct. 3088 (1986); *Blum v. Stenson*, 104 S.Ct. 1541 (1986); *In re Burlington Northern, Inc. Employment Practices Litigation*, 803 F.2d 279 (7th Cir. 1986); *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986); *McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984); *Bonner v. Coughlin*, 657 F.2d 931 (7th Cir. 1981). In *Blum v. Stenson*, the plaintiffs filed a § 1983 class action against the New York State Department of Social Services, challenging the state's method of allocating Medicare Benefits. The case was decided on cross motions for summary judgment after only one set of plaintiffs' interrogatories had been served and answered. *See generally Stenson v. Blum*, 476 F.Supp. 1331 (S.D. N.Y. 1979). The order granting summary judgment certified the class and entered final judgment for the plaintiffs. The Second Circuit affirmed this ruling, and the plaintiffs' counsel then petitioned the district court for an award of attorneys' fees pursuant to 42 U.S.C. § 1988. The district court determined a lodestar amount, and then awarded plaintiffs' counsel an upward adjustment of 50% to reflect "the quality of representation, the complexity of the issues, and the 'great benefit to the large class' that was achieved." *Blum*, 465 U.S. at 891, 104 S.Ct. at 1545, citing *Stenson v. Blum*, 512 F.Supp. 680, 685 (S.D. N.Y. 1981). The Second Circuit affirmed this award, and defendants appealed to the Supreme Court.

The Supreme Court rejected at the outset defendants' argument that a multiplier is never permissable. *Blum*, 465 U.S. at 897, 104 S.Ct. at 1548. It indicated, however, that multipliers should not be granted as a matter of course, and are appropriate only in rare cases which produce exceptional results. The court noted that, "[w]hen . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is *presumed*

to be the reasonable fee contemplated by [the statute]." *Blum*, 465 U.S. at 897, 104 S.Ct. at 1548 (emphasis added).

The Court then analyzed the four reasons that the district court articulated for allowing an enhanced fee award. With respect to the novelty and complexity of the issues, the court held:

> The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates. There may be cases, of course, where the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally will be expected to spend on a particularly novel or complex issue. In those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates. Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award.

Id. at 898, 104 S.Ct. at 1548-1549. Similarly, the Court also held that the "quality of representation is also reflected in the hourly rate, and may justify an upward adjustment "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Blum*, 465 U.S. at 899, 104 S.Ct. at 1549. The Court also held that, since the "results obtained" are generally factored into the determination of the lodestar, "it normally should not provide an independent basis for increasing the fee award." *Id.* (footnote omitted). Finally, because plaintiffs had not alleged an enhancement for the risk incurred in litigating this action, the Court held that a multiplier for "risk" was inappropriate. It expressly declined to decide whether

risk of not prevailing could ever justify an enhancement of the fee award. *Id.* at 900 and n. 16, 104 S.Ct. at 1550 and n. 16.

In *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 106 S.Ct. 3088 (1986), the Court reiterated *Blum*'s restrictive approach to multipliers in statutory fee cases. The *Delaware Valley* plaintiffs were awarded a multiplier to reflect the "superior" quality of representation and the contingent nature of the case. Following the position set forth in *Blum*, the Court held that the award of a multiplier for superior representation was clearly inappropriate. It noted:

> A strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate —represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, . . . the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. . . . In short, the lodestar figure includes most, if not all, of the relevant factors comprising a 'reasonable' attorneys' fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.

106 S.Ct. at 3098, 3099. The Court reserved ruling on the issue of whether a multiplier can be justified by the risk of loss, and set the matter for reargument next term. *Id.* at 3100.

In the present case, the only grounds on which plaintiffs request a multiplier is the alleged risk of loss. In *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984), the court noted that, "[i]n this circuit, the

risk of losing 'alone does not justify the use of a multiplier,'" *citing Bonner v. Coughlin*, 657 F.2d 931, 936 (7th Cir. 1981). The *McKinnon* court explained its reservations in connection with a "risk bonus":

> The fundamental problem of a risk bonus is that it compensates attorneys, indirectly but effectively, for bringing unsuccessful civil rights suits, even though the attorney's fee statute is expressly limited to cases where the party seeking the fee prevails. . . . Suppose a plaintiff asks for and receives a multiplier of 2 because he had a 50 percent chance of losing the case. This means that if the plaintiff's lawyer tries 10 such cases and wins 5 (as one would expect, if the risk of loss is indeed 50 percent), he will be paid as if he had won them all; that is, he will be paid twice his normal charge for each of the 5 cases he won, to compensate him for getting nothing for the cases he lost. Indeed, if the logic of the risk multiplier were applied consistently, the attorney's fee would be larger the riskier the case, even though this would mean rewarding lawyers for flooding the courts with unmeritorious litigation, something we very much do not need. Imagine a class of cases where only one in 50 plaintiffs prevails. Then the risk multiplier would be 50, and a lawyer who brought all 50 cases and lost 49 would receive the same compensation that he would have received had he been certain to win all 50 cases (in which event there would have been no multiplier, rather than (virtually) certain to lose 98 percent of them.

McKinnon, 750 F.2d at 1392. This concern was recently reiterated in *Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986) ("One common concern with compensation for risk is that the multiplier should rise as a probability of success falls, soaking the unlucky defendant who had a good case (more than a 50% chance of prevailing but lost anyway and therefore faced a huge multiplier"),

and *In re Burlington Northern, Inc. Employment Practices Litigation*, 803 F.2d 279, 286 (7th Cir. 1986) (Seventh Circuit has not favored the use of risk multipliers). *See generally* Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473 (1981) (listing several other problems associated with upward adjustments to compensate for the risk of not prevailing); Comment, *Nonpayment Risk Multipliers: Incentives or Windfalls?*, 53 U.Chi.L.Rev. 1074 (1986).

This case has been pending before this court since 1982. In the course of these proceedings, the court has had the opportunity to observe the class counsels' vigorous and able representation of the plaintiffs in this case, and has frequently commented on the superior quality of representation on both sides of this case. This litigation undoubtedly involved significant management obstacles, and entailed research into previously uncharted areas of the Magnuson-Moss Warranty Act. Despite the complexities of the case, however, the court finds that a "risk" multiplier is not necessary to fully compensate the class counsel for their representation of plaintiffs in these consolidated cases. Although the litigation has been pending a long time, the action never proceeded very far beyond the initial pleading stages. Some limited discovery was conducted; however, the bulk of the actual discovery on the merits had barely commenced when the parties began discussing the possibility of settlement.

Accordingly, in light of the state in which the parties ultimately settled the case, the court finds that an upward multiplier of the basic lodestar fees is neither necessary nor appropriate. The attorneys' fees that this court has included in its calculation of the lodestar amounts, particularly the allowance derived from current or near current rates for all attorneys, adequately compensates these firms for the "risk" involved in prosecuting this case. *See In re Burlington Northern, Inc. Employment Practices Litigation*, 803 F.2d 279 286-87 (7th Cir. 1986) (award of fees at current rates ameliorates the risk of nonpay-

ment); *Technology Fund, Inc. v. Kansas City Southern Industries, Inc.*, 72 F.R.D. 433, 440 (N.D. Ill. 1976), *In re Penn Central Securities Litigation*, 416 F.Supp. 907, 919 (E.D. Pa. 1976), *rev'd on other grounds*, 560 F.2d 1138 (3d Cir. 1977).

Conclusion

For the reasons set forth above, the court finds that the class counsel are not entitled to an upward adjustment or "risk multiplier" for their pursuit of this litigation. Whether viewed in terms of the Magnuson-Moss Act or the common fund doctrine, the fees calculated in accordance with the principles set forth in this opinion provide the proper amount of compensation to the plaintiffs' attorneys in this case. Accordingly, the court awards the fees and expenses set forth below to the nine law firms who have successfully represented the class in this case:

Attorney	Allowed Rate	Allowed Hours	Total Fees	Paralegals(P) Expenses(E)	Total
Charles A. Boyle & Associates	$190/hr.	1407.57	$ 267,438.30	$ 2,793.00(P) $ 30,763.42(E)	$ 300,994.72
Corinblit & Seltzer					
J. Corinblit	$200/hr.	26.20	$ 12,590.00	-0-(P)	$ 14,321.11
M. Seltzer	$175/hr.	42.00		$ 1,731.11(E)	
Abraham N. Goldman & Assoc., Ltd.					
A. Goldman	$150/hr.	1776.80	$ 269,576.25	$175,193.24(P)	$ 464,414.75
Associates	$75/hr.	40.75		$ 19,645.26(E)	
Goodkind, Weschler, Labaton & Rudoff					
S. Weschler	$220/hr.	18.85	$ 144,962.00	$ 7,278.42(P)	$ 165,264.74
E. Labaton	$220/hr.	2.50		$ 13,024.32(E)	
W. Kass	$200/hr.	16.20			
R. Schacter	$160/hr.	157.50			
L. Sudarow	$150/hr.	40.08			
J. Plasse	$120/hr.	655.35			
M. Isaacs	$70/hr.	69.85			
E. Perry	$70/hr.	302.40			
Others	$85/hr.	13.10			
Frances E. Goodman, P.C.	$120/hr.	307.20	$ 36,864.00	-0-(P) $ 2,510.00(E)	$ 39,374.00
William J. Harte, Ltd.					
W. Harte	$200/hr.	749.80	$ 154,664.75	$165,685.97(P)	$ 331,438.72
Associates	$85/hr.	55.35		$ 11,088.00(E)	

Law Offices of Beverly C. Moore, Ltd.					
B. Moore	$140/hr.	2204.00	$ 310,510.00	$ 43,441.50(P)	$ 396,813.32
Other Attys.	$50/hr.	39.00		$ 42,861.82(E)	
Sachnoff, Weaver & Rubenstein					
L. Sachnoff	$240/hr.	663.60	$ 725,832.40	$ 51,239.44(P)	$ 885,934.97
B. Rosen	$145/hr.	2199.72		$ 93,863.13(E)	
M. Tennenbaum	$125/hr.	28.30		$ 15,000.00(jt.E) (brief)	
M. Denlow	$110/hr.	22.50			
C. Watkins	$135/hr.	2.60			
J. Schumacher	$130/hr.	1763.50			
J. Feldman	$80/hr.	5.46			
D. Morris	$70/hr.	6.20			
M. Kaufman	$90/hr.	23.50			
Zwerling, Schacter & Zwerling					
R. Schacter	$160/hr.	66.56	$ 10,759.60	$ 54.00(P)	$ 13,037.70
J. Zwerling	$160/hr.	.6		$ 2,224.10(E)	
J. Barkhorn	$70/hr.	.2			
TOTALS:			$1,933,197.30		$2,611,593.90

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

Dated: February 11, 1987

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 1243

CLASS ACTION

JUDGE JOHN NORDBERG

ARLIE GLEN SKELTON, *et al.*, on behalf of themselves and all others similarly situated,
Plaintiffs,

—VS—

GENERAL MOTORS CORPORATION,
Defendant.

No. 80 C 2151

JOSEPHINE C. NEWTON, *et al.*, on behalf of themselves and all others similarly situated,
Plaintiffs,

—VS—

GENERAL MOTORS CORPORATION,
Defendant.

And All Consolidated Actions

[Filed May 1, 1989]

ORDER

Pursuant to the oral opinion of the Court on April 25, 1989, plaintiffs' counsel are awarded a multiplier of 1.6 on the loadstar attorneys' fees previously awarded by this Court. In addition, the Court awards interest on the additional fees from the date of the Court's Order of February 16, 1987, to date, in a total amount of 18% for the entire period.

The prior loadstar attorneys' fees awarded in the Court's Order of February 16, 1987 totaled $1,933,197.30. Additional fees of $56,463.75 were awarded to the Sachnoff firm on March 16, 1987 to correct a clerical error in the February 16, 1987 Opinion, for amended total loadstar fees of $1,989,661.05. Applying the multiplier to these awards results in additional aggregate fees of $1,193,797.00. The interest to be paid on this additional fee is $214,883.00, for a total additional award plus interest of $1,408,679.80.

Further, pursuant to the distribution of these fees to plaintiffs' counsel in the Court's previous Orders, the new award is to be paid out as follows:

Attorney	Prior Loadstar	Additional Fee	Interest (18%)	Total Additional Fees and Interest
Charles A. Boyle & Assoc.	$267,438.30	$160,463.00	$28,883.00	$189,346.00
Corinblit & Seltzer	12,590.00	7,554.00	1,360.00	8,914.00
Abraham N. Goldman & Assoc.	269,576.25	161,746.00	29,114.00	190,860.00
Goodkind, Weschler, Labaton & Rudoff	144,962.00	86,977.00	15,656.00	102,633.00
Frances E. Goodman	36,864.00	22,118.00	3,981.00	26,099.00
William J. Harte, Ltd.	154,664.75	92,799.00	16,704.00	109,503.00
Beverly C. Moore, Ltd.	310,510.00	186,306.00	33,535.00	219,841.00
Sachnoff, Weaver & Rubenstein	782,296.00	469,378.00	84,488.00	553,866.00
Zwerling, Schacter & Zwerling	10,759.60	6,456.00	1,162.00	7,618.00
TOTALS		$1,193,797	$214,883	$1,408,680

General Motors agrees that the foregoing Order accurately sets forth the Court's April 25, 1989 oral ruling, but continues to object to the award of any such multiplier and disputes that any proper finding supporting such an award has been or could be made by the Court. The Court enters said award over the objections of General Motors.

Payment of the foregoing fees are subject to security arrangements acceptable to the Court. Timing of payment shall be set by further order of the Court.

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

Dated: April 28, 1989

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 13, 1989

Before HON. WILLIAM J. BAUER, *Chief Judge*
Before HON. RICHARD D. CUDAHY, *Circuit Judge*
Before HON. JOHN L. COFFEY, *Circuit Judge*

Nos. 87-1404, 87-1530 and 87-1610

ARLIE GLEN SKELTON, et al., on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLANTS,

v.

GENERAL MOTORS CORPORATION, DEFENDANT-APPELLEE.

Appeal of: Sachnoff, Weaver & Rubenstein, Ltd.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 79 C 1243, 80 C 2151 and 85 C 4805
John A. Nordberg, *Judge*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by appellee, General Motors Corporation, no judge in active service* requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Circuit Judges Walter J. Cummings and Richard A. Posner did not participate in consideration of this petition.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 13, 1989

Before HON. WILLIAM J. BAUER, *Chief Judge*
Before HON. RICHARD D. CUDAHY, *Circuit Judge*
Before HON. JOHN L. COFFEY, *Circuit Judge*

No. 87-1530

ARLIE GLEN SKELTON, et al., on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLANTS,

v.

GENERAL MOTORS CORPORATION, DEFENDANT-APPELLEE.

Appeal of: Law Offices of
Beverly C. Moore, Jr., APPELLANT.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division

Nos. 79 C 1243, 80 C 2151 and 85 C 4805
John A. Nordberg, *Judge*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by appellant, Law Offices of Beverly C. Moore, Jr., and the response thereto by General Motors Corporation, no judge in active service* requested a vote thereon, and all of the judges on

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* Circuit Judges Walter J. Cummings and Richard A. Posner did not participate in consideration of this petition.

the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-771

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 13, 1989.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 27 day of March, 1989.

APPENDIX F

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly owned except the following:

AeroVironment Inc. (USA)
Alambrados Automotrices, S.A. de C.V. (Mexico)
Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)
AMBRAKE Corporation (USA)
Applied Intelligence Systems, Inc. (USA)
Aralmex, S.A. de C.V. (Mexico)
Automotive Polymer Based Composites Joint Venture and Development Partnership (Co-Partnership among GM, Ford and Chrysler to coordinate basic research on plastic component materials)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Avis, Inc. (U.S.A.)
Bujias Mexicanas, S.A. de C.V. (Mexico)
Cableados de Juarez, S.A. de C.V. (Mexico)
CABLESA-Industria de Componentes Electricos Limitada (Portugal)
Calsonic Harrison Co., Ltd. (Japan)
Comau Productivity Systems, Inc. (USA)
Compagnie de Faisceaux Tunisian International S.A. (Tunisia)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Componentes Delfa, C.A. (Venezuela)
Componentes Mecanicos de Matamoros, S.A. de C.V. (Mexico)
Conductores y Componentes Electricos, de Juarez, S.A. de C.V. (Mexico)
Convesco Vehicles Sales GmbH (West Germany)
Daewoo Automotive Components, Ltd. (Korea)
Delco Electronics Corporation (USA)

Delkor Battery Company, Ltd. (Korea)
Delmex de Juarez, S.A. de C.V. (Mexico)
Delredo, S.A. de C.V. (Mexico)
Detroit Deere Corporation (USA)
Detroit Diesel Corporation (USA)
DHB—Componentes Automotivos S.A. (Brazil)
DHMS Industries, Ltd. (Korea)
Diffracto Limited (Canada)
DR DE CHIHUAHUA, S.A. de C.V. (Mexico)
Ensamble de Cables Y Componentes, S.A. de C.V. (Mexico)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)
General Motors do Brasil, Ltda. (Brazil)
General Motors de Colombia S.A. (Colombia)
General Motors del Ecuador S.A. (Ecuador)
General Motors de Mexico, S.A. de C.V. (Mexico)
General Motors Egypt, S.A.E. (Egypt)
General Motors Espana, S.A. (Spain)
General Motors (Europe) AG (Switzerland)
General Motors France (France)
General Motors Hellas, A.B.E.E. (Greece)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
General Motors del Peru S.A. (Peru)
General Motors de Portugal, Limitada (Portugal)
Genie Mecanique Zairose, S.A.R.L. (Zaire)
GM Allison Japan Limited (Japan)
GMFanuc Robotics Corporation (USA)
Hua Tung Automotive Corporation (Rep. of China)
IBC Vehicles Limited (England)
Ilmor Engineering, Ltd. (England)
Industries Mecaniques Maghrebines, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)

Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)
Metal Casting Technology, Inc. (USA)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
NHK Inland Corporation (Japan)
Omnibus BB Transportes, S.A. (Ecuador)
Packard Electric Ireland Limited (Ireland)
Promotora de Partes Electronics Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Rimir, S.A. de C.V. (Mexico)
Rio Bravo Electricos, S.A. de C.V. (Mexico)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Shinsung Packard Company, Ltd. (Korea)
Sistemas Electricos y Commutadores, S.A. de C.V. (Mexico)
Sung San Company, Ltd. (Korea)
Suzuki Motor Co., Ltd. (Japan)
Tactical Truck Corporation (USA)
Teknowledge, Inc. (USA)
TEREX Equipment Limited (Scotland)
Vauxhall Motors Limited (England)
Vestiduras Fronterizas, S.A. de C.V. (Mexico)
View Engineering (USA)
Volvo GM Heavy Truck Corporation (USA)